Supreme Court, U.S.
FILED
93130 1 FEB 1 1 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN, and DR. COSETTE Z. VILLANUEVA,

Petitioners,

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

KARY L. MOSS
MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE
2915 Cadillac Tower
Detroit, Michigan 48226
(313) 962-6540

MARK GRANZOTTO
(Counsel of Record)
One Kennedy Square
Suite 1814
Detroit, Michigan 48226
(313) 964-4720

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

102 pp

QUESTIONS PRESENTED FOR REVIEW

Whether an employer's subjective perception that an "unforeseeable business circumstance" required the closing of its business can enable that employer to escape liability, pursuant to 29 U.S.C. § 2102 (1988), for failing to provide its employees with the 60 days advance notice required under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (1988).

Whether an employer may claim that it was uninformed of its own financial status, when critical information was available within the employer's own business records, as a defense under 29 U.S.C. § 2102 (1988), after it failed to provide the 60 days notice required prior to closing the business under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (1988).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. The Creation of the Foundation	3
2. The Decision to Close the Hospital	6
3. The Proceedings Below	9
REASONS FOR GRANTING THE WRIT	10
I. THE SEVENTH CIRCUIT IMPROPERLY INTERPRETED THE WARN ACT IN CONCLUDING THAT THE CLOSING OF THE HOSPITAL WAS CAUSED BY BUSINESS CIRCUMSTANCES THAT WERE NOT REASONABLY FORSEEABLE	10
A. Courts Must Use An Objective Standard When Assessing Whether Business Circumstances Are "Unforseeable" For Purposes Of The WARN Act	12
B. The Seventh Circuit Committed Reversible Error By Deferring To The Defendants Subjective Belief That The Circumstances Which Led To The Hospital's Closing Were Not Reasonably Foreseeable	14
II. THE SEVENTH CIRCUIT'S BROAD INTERPRETATION OF THE "FORSEEABILITY" DEFENSE FAILED TO RECOGNIZE THE DOCTRINE OF IMPUTED CORPORATE KNOWLEDGE	19

TABLE OF CONTENTS—Continued

Page

III. THE IMPORTANCE OF THE CASE 21

CONCLUSION 23

APPENDIX

Seventh Circuit Court of Appeals Opinion (October 14, 1993) 1a

District Court Opinion (March 5, 1992) 22a

Defendants' Response to Plaintiffs' Statement of Uncontested Facts 31a

Plaintiffs' Response to Defendants' Statement of Uncontested Facts 58a

Relevant Statutory Provisions 71a

TABLE OF AUTHORITIES

CASES Page

Carpenters Dist. Council v. Dillard Dept. Stores, Inc., 778 F. Supp. 297 (E.D. La. 1991) 12, 13
Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 12
Finkler v. Elsinore Shore Assoc., 781 F. Supp. 1060 (D.N.J. 1992) 12
Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951) 20
International Ass'n. of Machinists & Aerospace Workers v. General Dynamics, 821 F. Supp. 1306 (E.D. Mo. 1993) 13
Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276 (E.D. Tenn. 1990) 10
Jurcev v. Central Community Hosp., 7 F.3d 618 (7th Cir. 1993) ..... *passim*
Sadowski v. Long Island R. Co., 292 N.Y. 448, 55 N.E.2d 497 (1944) 16
Solberg v. Inline Corp., 740 F. Supp. 680 (D. Minn. 1990) 22
United States v. Bank of New England N.A., 821 F.2d 844 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987) 20
United States v. Osorio, 929 F.2d 753 (1st Cir. 1991) 20, 21
United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730 (W.D. Va. 1974) 20, 21
Urie v. Thompson, 337 U.S. 163 (1949) 16
Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Servs., Inc., 826 F. Supp. 326, 332 (C.D. Cal. 1993) 13

STATUTES AND REGULATIONS

26 U.S.C. § 501 (1988) 3, 4
26 U.S.C. § 509 (1988) 3, 5
28 U.S.C. § 1254(1) (1970) 2
28 U.S.C. § 1331 (1988) 9
29 U.S.C. §§ 2101 *et seq.* (1988) ..... *passim*
20 C.F.R. § 639 (1993) 12, 13

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

	Page
3 *Fletcher Cyc. Corp.* § 790 (Perm. Ed.)	20
Staff of Committee on Ways and Means, 102d Congress, 2d Session, *1992 Green Book: Overview of Entitlement Programs* (1992)	11
Dislocated Workers: Implementation of the Worker Adjustment and Retraining Notification Act (WARN) Before the Senate Subcommittee on Labor, Committee on Labor and Human Resources, February 23, 1993	22
House Subcommittee on Labor-Management Relations of the Committee on Education and Labor, 100th Congress, 2d Session, *reprinted in* Legislative History of the Worker Adjustment Retraining Notification Act, 1988 (1990)	22
54 Fed. Reg. 16062 (1989)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. ————

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN, and DR. COSETTE Z. VILLANUEVA,
Petitioners,

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The October 14, 1993, opinion of the United States Court of Appeals for the Seventh Circuit is reported. *Jurcev v. Central Community Hosp.*, 7 F.3d 618 (7th Cir. 1993). A copy of that opinion is contained in the attached Appendix, beginning at page 1a.

The written opinion of the District Court dated May 5, 1992, is not reported. A copy of that opinion is contained in the attached Appendix, beginning at page 22a.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was rendered on October 14, 1993.

On December 30, 1993, Petitioners filed in this Court an Application to Extend Time to File Petition for Writ of Certiorari. On January 4, 1994, Associate Justice John Paul Stevens signed an Order extending the time for filing a Petition for Writ of Certiorari to February 11, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1970).

STATUTES INVOLVED

The relevant portions of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988), are set out in the attached Appendix, beginning at page 71a.

STATEMENT OF THE CASE

Petitioner Central Community Hospital (the Hospital), located in Chicago, Illinois, closed on March 14, 1990 without providing Hospital employees with the 60 day notice [1] required by the Worker Adjustment Retraining and Notification (WARN) Act. 29 U.S.C. §§ 2101-2109 (1988). This case raises the question whether the Hospital may be permitted to evade Congress' mandate that employers provide such notice before closing by resort to the "unforeseeable business circumstance" defense available under the WARN Act. 29 U.S.C. § 2102(b)(2)(A).

---

[1] There has been some dispute between the parties concerning the precise date that effective notice of the Hospital's closing was given to its employees. For present purposes that debate is irrelevant because, even accepting the Hospital's version of the events preceding the closing, it is clear that the required 60 days notice was not provided.

1. *The Creation of the Foundation*

The Hospital was a not-for-profit corporation organized under the laws of the State of Illinois and exempt from income taxes under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1988) (App. 3a). As of 1983, the Hospital was a soundly capitalized institution, fully capable of satisfying all of its financial obligations. The Hospital's financial independence was modified, however, when the Hospital itself created and funded the Central Community Foundation ("the Foundation") (App. 3a).

The Foundation [2] is an Illinois not-for-profit corporation which was incorporated on December 20, 1983 (App. 3a). The Foundation was formed pursuant to a December 23, 1983 resolution of the Hospital's Board of Trustees, as a "support foundation" for the Hospital under 26 U.S.C. §§ 501(c)(3) and 509(a)(3) of the Internal Revenue Code (App. 3a). The resolution creating the Foundation provided that the Foundation was "to be operated, supervised and controlled by or in connection with the Hospital, for the purposes of conducting or supporting activities for the benefit of . . . the Hospital" (App. 33a).

The Foundation's Articles of Incorporation also provided that it was to be operated exclusively for the benefit of or to carry out the purposes of the Hospital (App. 3-4a). To accomplish these purposes, the Articles of Incorporation expressly empowered the Foundation to receive assets in any form and "to use, apply, invest and reinvest the principal and/or income therefrom or dis-

---

[2] On June 18, 1990 the District Court allowed Plaintiffs to file an Amended Complaint against the Prairie Foundation, formerly Central Community Foundation, as a Defendant. The District Court granted the Hospital's motion for summary judgment on March 6, 1992, and modified its order on March 20, 1992 to include the dismissal of the complaint against the Foundation. However, the Plaintiffs never served Central Community Foundation with process and so the Foundation did not file an appearance or pleading in the case (App. 7a).

tribute the same" for these specified purposes (App. 3-4a). Thus, at the time its Articles of Incorporation were written, the Foundation was authorized to use both interest and principal to support the Hospital.

As created, the Foundation was to be administered by four trustees, each of whom was to be appointed by the Hospital, and each of whom was also a member of the nine person Hospital Board of Trustees (App. 3a). At all times relevant to this case, Sherwin Stone served as President and Trustee of the Foundation (App. 32a) and served as general counsel for both the Hospital and the Foundation (App. 33a). The remaining three trustees and officers of the Foundation were Patrick A. DeMoon, Patrick S. DeMoon and Dr. Algirdas Maciunas (App. 3a).

On June 7, 1984, the Foundation filed with the Internal Revenue Service ("I.R.S.") an Application for Recognition of Exemption ("Application") under § 501 (c)(3) of the Internal Revenue Code (App. 34a). Attached to the Application were the Foundation's Articles of Incorporation which expressly authorized distribution of principal to support the Hospital (App. 61a). The Application vertified that the Foundation was to be controlled by the Hospital through the annual appointment of the Foundation's Trustees.

One of the questions contained in the Application required the Foundation to indicate whether it intended to use its assets as an endowment fund. In response to this question, the Foundation represented:

> The Foundation plans to utilize all assets received by it from the supported organization as an endowment fund to produce income for support of the Foundation's exempt activities and to give financial support to the 501(c)(3) organization.

(App. 35a).

According to testimony later elicited in this case, the Foundation consciously used the word "income" in responding to this question in the Application, thereby limiting the amounts which it could distribute to the Hospital to the income generated by the Foundation, not the principal (App. 35a). The Foundation took this step on the basis of advice provided by its accounting firm which suggested that such a limitation might increase the chances that the I.R.S. would grant the Foundation tax exempt status.

On December 17, 1984, the I.R.S. issued a determination letter that the Foundation would be exempt from taxes "assuming that [its] operations will be as stated in the Application," and classified the Foundation as a "support organization" under the provisions of § 509(a)(3) of the Internal Revenue Code (App. 4a, 36a). The December 17, 1984 letter also provided the name and telephone number of a contact person at the I.R.S. if any questions arose concerning the exemption ruling (App. 36a).

On December 20, 1984 the Hospital's Board of Trustees unanimously approved the transfer of the Hospital's investment portfolio to the Foundation. The Hospital transferred to the Foundation assets valued at over $19,000,000.00 (App. 4a, 37a).

Very shortly after these events in December 1984, Sherwin Stone had a conversation with Dr. Algirdas Maciunas, who was also an officer and Board of Trustees member of both entities. During that conversation Mr. Stone advised Mr. Maciunas that any distribution of money from the Foundation to the Hospital had to come from the Foundation's income, not from principal (App. 41a).

Between November 4, 1985 and January 22, 1990, the Foundation made the following unrestricted subventions to the Hospital totalling nearly $12,000,000.00:

November 4, 1985	—	$ 250,000.00
February 24, 1986	—	$ 100,000.00
December 3, 1986	—	$1,000,000.00
January 27, 1987	—	$1,000,000.00
June 27, 1987	—	$1,000,000.00
November 26, 1987	—	$1,000,000.00
January 15, 1988	—	$ 600,000.00
April 15, 1988	—	$1,000,000.00
August 11, 1988	—	$1,000,000.00
November 8, 1988	—	$1,000,000.00
March 2, 1989	—	$1,000,000.00
June 29, 1989	—	$1,000,000.00
October 18, 1989	—	$1,000,000.00
January 22, 1990	—	$1,000,000.00

(App. 38a).

The consistent subvention of large sums of money beginning in December 1986 was due to the fact that, during this period of time, the Hospital was operating at a substantial loss (App. 16a, 38a). Thus, from 1986 through 1990, the Hospital had to rely on the subventions from the Foundation, which provided cash to the Hospital on an "as needed" basis.

2. *The Decision to Close the Hospital*

Not until the Foundation's eleventh $1,000,000.00 subvention to the Hospital on January 22, 1990, did any officer of either the Hospital or Foundation ascertain whether the frequent and large subventions were invading the principal. According to the Respondents, Sherwin Stone became concerned subsequent to the January 22, 1990 subvention about the frequency and amount of these distributions (App. 63a). Mr. Stone asked the Hospital's Comptroller, Harold Reisler, to prepare a summary of the subventions made by the Foundation and to calculate all income the Foundation had earned. In February 1990, Mr. Stone received this information and learned that the October 18, 1989, and January 22, 1990, subventions

had exceeded the Foundation's cumulative earnings (App. 64a).

Despite having received annual audited financial statements for the Hospital and Foundation (App. 40a) Mr. Stone claimed that he learned for the first time in February 1990 that the subventions to the Hospital had invaded the Foundation's principal (App. 4a). However, Mr. Reisler, the Hospital's comptroller, who also performed all of the internal accounting for the Foundation, was aware that the Foundation's distribution had invaded principal at the time the October 18, 1989, subvention of $1,000,000.00 was made (App. 16-17, 40a).

Mr. Stone reviewed the Foundation's Application to the I.R.S. and became concerned that the invasion of the Foundation's principal might violate the conditions under which it obtained its tax exempt status. As a result, he convened a special meeting of the Hospital's Board of Trustees on February 19, 1990, at which time he advised the Trustees that the Foundation might be precluded from making any further distributions to the Hospital in excess of the Foundation's income. Mr. Stone further advised the Hospital's Trustees that the legal consequences of the invasion of principal would be researched (App. 24a).

That same day, Mr. Stone held a meeting with two attorneys in his law firm. Mr. Stone directed an associate to prepare a memorandum regarding the possible legal implications for the Foundation of the invasion of principal (App. 24a).

After several hours of research on the legal issues involved, Mr. Stone's associate drafted a two page memorandum which began with the warning that it should not be considered to include definitive legal or tax advice (App. 45a). This memorandum speculated that it was "possible" that use of the principal could affect the Foundation's tax exempt status (App. 45a). Nevertheless, the

memorandum concluded that "it was unlikely that the Foundation would lose its exempt status" (App. 45a). Despite this conclusion, the memorandum suggested that a conservative course be taken and recommended that the Foundation make no further subventions until a ruling on the effect of the invasion of principal could be obtained from the I.R.S. The memorandum estimated that such a process could take "a number of months." *Id.*

Mr. Stone also telephoned Thomas Trabon, a partner in the accounting firm which served the Foundation, and advised him of possible concerns involving the Hospital's continued use of principal to support the Hospital (App. 46a). According to Mr. Stone, Mr. Trabon indicated that the Foundation would be taking a chance with its exempt status if it did not conform to the terms of its exemption (App. 25a, 46a).

The Foundation's Trustees met on February 26, 1990. At that meeting Mr. Stone advised the other three Trustees of the legal memorandum prepared by his associate and his conversation with Mr. Trabon. Based on Mr. Stone's advice, the Foundation's Trustees voted to suspend making subventions to the Hospital until any of three conditions were satisfied: either the Hospital repaid the amount of principal invaded by the October 1989 and January 1990 subventions, the Foundation earned sufficient monies to offset the depleted principal, or the Foundation received a definitive ruling from the I.R.S. permitting the payment of principal to the Hospital (App. 25a).

Immediately after the meeting of the Foundation's Board of Trustees, the Board of Trustees of the Hospital met. At that meeting, Mr. Stone announced that, subject to the three conditions established by the Foundation's Board, the Foundation would not make any further subventions (App. 25a). P. S. DeMoon, one of the four individuals who was a Trustee for both the Foundation and the Hospital, advised the Trustees that the Hospital

did not have the resources to wait for a ruling from the I.R.S. Rather, Mr. DeMoon informed the Trustees that the Hospital had only enough cash on hand plus anticipated cash receipts to keep the Hospital open only for approximately two weeks (App. 25a).

The Hospital's Trustees voted to close the Hospital effective March 14, 1990, the date the Hospital's cash was projected to run out (App. 25a). On that date the Hospital closed without giving the 60 days written notice to its employees required by the WARN Act. All of the Hospital's employees were terminated on that date (App. 25a) except for a limited number of security, custodial and administrative employees who were retained to conclude the Hospital's affairs (App. 52a).

3. *The Proceedings Below*

On March 28, 1990, Petitioners, employees who lost their jobs when the Hospital closed, filed this class action [3] against the Hospital.[4] Following discovery, the Hospital filed a motion for summary judgment. In its motion, the Hospital conceded that the WARN Act applied to the Petitioners and further acknowledged that it did not provide the requisite notice mandated by that Act. The Hospital claimed, however, that the WARN Act's 60 day notice requirement did not apply pursuant to 29 U.S.C. § 2102(b)(2)(A), which reduces the notification period where a plant closing "is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

---

[3] The district court granted Plaintiffs' motion for class certification on August 16, 1990.

[4] In their complaint, Petitioners alleged violations of the WARN Act as well as two claims based on Illinois law. The jurisdiction of the district court was premised on 28 U.S.C. § 1331 (1988) as to the WARN Act claim and on the doctrine of pendent jurisdiction with respect to the state law claims.

On May 5, 1992, the District Court issued a Memorandum Opinion and Order granting summary judgment to the Hospital on the WARN Act claim and dismissing Petitioner's pendent state law claims (App. 22a). The District Court, while acknowledging that the Respondents had failed to give the required notice mandated by the WARN Act,[5] held that the Hospital had established that the circumstances which caused the closing of the Hospital were not "reasonably forseeable" as a matter of law.

Petitioners appealed that decision to the United States Court of Appeals for the Seventh Circuit, which, on October 14, 1993, issued an opinion affirming the District Court's ruling (App. 1a).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT IMPROPERLY INTERPRETED THE WARN ACT IN CONCLUDING THAT THE CLOSING OF THE HOSPITAL WAS CAUSED BY BUSINESS CIRCUMSTANCES THAT WERE NOT REASONABLY FORESEEABLE.

This case concerns an important question of first impression regarding the proper interpretation of the WARN Act.

The decisions below are premised on an erroneous application of the exception contained in 29 U.S.C. § 2102 (a)(1) of the WARN Act which mandates that an employer "shall not order a plant closing or mass layoff until the end of a sixty-day period after the employer serves written notice of such an order . . . to each affected employee." (App. 71a). The issue presented in this case involves the exception to the 60 day notice requirement

[5] The District Court held that "[T]here is no dispute here that on February 26, 1990, there was a "plant closing" due to the Hospital's closure, or that the plaintiffs were "affected employees" or that the employees suffered an "employment loss" under the Act. And the defendants obviously are not contending that they provided 60-day notice as the WARN Act requires." (App. 26a).

contained in 29 U.S.C. § 2102(b)(2)(A). This provision states:

> An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably forseeable as of the time that notice would have been required.

(App. 72a).

The courts below erred by accepting the Hospital's subjective viewpoint that the Foundation's decision to suspend subventions was unexpected. The issue presented by this subsection is not whether the circumstances which led to the Hospital's closing were sudden, dramatic or unexpected from the standpoint of the Hospital's Trustees, but whether these circumstances should have been sudden, dramatic or unexpected to the Hospital.

The Seventh Circuit's decision in this case raises significant concerns regarding future litigation under the WARN Act. The WARN Act is, by its very nature, implicated by far reaching employment decisions—plant closing or mass layoffs—which are, in most cases the product of changing "business circumstances."[6] If an employer can, through inattentiveness, inactivity or ignorance of relevant facts, help create the exigent circumstances which lead to a plant closing or mass layoff, the exception specified in 29 U.S.C. § 2102(b)(2)(A) of the Act would substantially limit the scope of the WARN Act, despite Congressional intent to the contrary.

---

[6] The Department of Labor's Bureau of Labor Statistics has released data that indicates that "1.9 million adult workers (those 20 and older) lost full-time jobs, on average, each year between 1981 and 1988 because their employers closed or relocated, because their position or shift was eliminated, or because of slack work." Staff of Committee on Ways and Means, 102d Cong., 2d Sess., *1992 Green Book: Overview of Entitlement Programs*, at 553, 562 (1992).

A. Courts Must Use An Objective Standard When Assessing Whether Business Circumstances Are "Unforseeable" For Purposes Of The WARN Act.

In analyzing the scope of the "unforseeable business circumstance" exception, the regulations promulgated by the Department of Labor provides an appropriate beginning point.[7] The Secretary of Labor has indicated that "[t]he employer bears the burden of proof that conditions for the exceptions [stated in § 2102(b)] have been met." 20 C.F.R. § 639.9 (1993). The Department of Labor's regulations provide the following guidance:

> An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some *sudden, dramatic, and unexpected action or condition outside the employer's control.* A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

20 C.F.R. § 639.9(b)(1) (emphasis added).

The language thus clearly suggests that the defense applies only to circumstances that are extraordinary and

---

[7] These regulations have been issued pursuant to the explicit authority granted by Congress in 29 U.S.C. § 2107, which provides that the Secretary of Labor "shall prescribe such regulations as may be necessary to carry out this chapter." Based on the express grant of power to the Secretary of Labor in § 2107, at least two courts have concluded that the Department of Labor's WARN Act regulations constitute substantive rules which have "the force and effect of law," based on the principles announced by this Court in such cases as *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979). *See Finkler v. Elsinore Shore Assoc.*, 781 F. Supp. 1060, 1064 (D.N.J. 1992); *Carpenters Dist. Council v. Dillard Dept. Stores, Inc.*, 778 F. Supp. 297, 307, n.12 (E.D. La. 1991).

unpredictable, and thus, are not reasonably forseeable. *Compare Carpenters Dist. Council v. Dillard Dept. Stores, Inc.*, 778 F. Supp. 297 (E.D. La. 1991) and *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276, 1288 (E.D. Tenn. 1990) *with Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Servs., Inc., 826 F. Supp. 326, 332 (C.D. Cal. 1993)* and *International Ass'n. of Machinists & Aerospace Workers v. General Dynamics*, 821 F. Supp. 1306, 1312 (E.D. Mo. 1993).

The regulations promulgated by the Department of Labor confirm a fact which is implicit in Congress' use of the words "reasonably foreseeable" in § 2102(b)(2)(A) —the scope of this exception to the WARN Act is to be assessed on the basis of an objective standard, measured by reasonable commercial conduct:

> The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.

20 C.F.R. § 639.9(b)(2).

The regulations thus ". . . provide an objective test by focusing on the commercial reasonableness of the employer's actions." 54 Fed. Reg. 16062 (1989), *reprinted in* Legislative History of the Worker Adjustment and Retraining Notification Act, 1988, at 53 (1990). *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276, 1288 (E.D. Tenn. 1990) (defendants' subjective belief regarding business circumstances "is not relevant" to the duty to give notice.").

Had Congress intended a subjective test, it could have accomplished that result easily by providing for an exception to the WARN Act for business circumstances not *foreseen* by the employer. The use of the word "fore-

seeable" refutes any suggestion that the subjective view of an employer controls on this question. This fact is reinforced by the requirement that the business circumstances not be *reasonably* foreseeable. As the Department of Labor regulations have noted, reasonable foreseeability compels reference to a standard of conduct quite removed from the subjective knowledge of the employer.

B. The Seventh Circuit Committed Reversible Error By Deferring To The Defendants Subjective Belief That The Circumstances Which Led To The Hospital's Closing Were Not Reasonably Forseeable.

In ruling that summary judgment in favor of the Hospital was appropriate, the Seventh Circuit seriously misconstrued the legal standard provided in 29 U.S.C. § 2102 (b)(2)(A) and the Secretary of Labor's regulations. The Seventh Circuit came to the conclusion that the business conditions which necessitated the closing of the Hospital were not reasonably foreseeable based on the subjective knowledge and appreciation of these conditions by the members of the Hospital's Board of Trustees. The Seventh Circuit stated in its opinion:

> Seven members of the Hospital's Board of Trustees testified during their depositions that they did not know of the Foundation's decision to discontinue taking subventions until February 26, 1990, . . . And it was not until late February of 1990 that anyone on either Board became aware that dipping into principal to make the subventions might have violated the terms of the Internal Revenue Service's grant of tax-exempt status to the Foundation.

7 F.3d at 626 (App. 15a).

Thus, according to the Seventh Circuit, because the Hospital's Trustees did not (subjectively) know of the Foundation's decision to cease making subventions until late February 1990, the Hospital could invoke the exception contained in 29 U.S.C. § 2102(b)(2)(A). There is

a fundamental legal error in the Seventh Circuit's analysis of this question. For, even assuming that the Trustees of the Hospital and the Foundation had no subjective knowledge of the economic circumstances which led to the Hospital's failure until February 1990, such proof fails to address the central question presented by the exception to the WARN Act—whether their lack of knowledge was, from an objective standpoint, "reasonably foreseeable."

In 1984, the Hospital placed its financial future in the hands of another entity when it transferred assets in excess of $19,000,000 to the Foundation. Over the years which followed, the Foundation's unrestricted subventions to the Hospital became extremely large and took on increasing importance for the Hospital. From November 1985 through January 1990, the Foundation distributed nearly $12,000,000.00 to the Hospital (App. 38a). Moreover, from December 1986 through January 1990 the Foundation distributed money to the Hospital on the average of once every three months, almost always in the amount of $1,000,000.00. These subventions were critically important for the Hospital's continuing operation since the Hospital sustained deficits of approximately $3,000,000.00 during its 1988 and 1989 fiscal years (App. 13a). As the Respondent described with perhaps some degree of understatement in its brief to the Seventh Circuit, the multi-million dollar losses which the Hospital experienced in 1987, 1988 and 1989, "although troubling, were not a matter of life and death because the Foundation always provided cash when the Hospital needed it." Appellee's Brief at 20.

While the multi-million dollar losses were not, in and of themselves, a matter of life and death for the Hospital, the continued flow of money from the Foundation to the Hospital undoubtedly constituted a "life and death" situation for the Hospital. Thus, judged on a commercially reasonable standard, it was absolutely essential that the

Trustees of the Hospital take all steps necessary to see that the subventions from the Foundation continued without interruption. Instead, the Hospital and its Trustees did nothing.

The "reasonable foreseeability" standard provided in § 2102(b)(2)(A) is, of course, identical to a concept which has been applied in tort law with great frequency. It would appear, therefore, that reference to tort law concepts might be instructive in interpreting this provision. One such tort concept was discussed by this Court in *Urie v. Thompson*, 337 U.S. 163, 179 (1949): "Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect", *quoting Sadowski v. Long Island R. Co.*, 292 N.Y. 448, 55 NE.2d 497 (1944). Stated differently, the amount of ordinary care required under the circumstances—*i.e.* the reasonableness of particular conduct—is a function of the seriousness of the possible consequences. Thus, as applied to this case, the reasonable business judgment exercised by the Hospital and its Trustees must be gauged in light of the overwhelming importance that the Foundation's subventions had taken on for the Hospital's continuing existence.

The Hospital and its Trustees did nothing, despite the fact that they knew or should have known a number of essential facts. They knew or should have known that the Foundation was originally endowed with approximately $19,000,000.00. They knew or should have known that the Hospital's financial condition was deteriorating. They knew or should have known that the Foundation was supplying millions of dollars to the Hospital through frequent subventions. They knew or should have known that the frequency and magnitude of these subventions would eventually deplete the earning capacity of the Foundation's corpus. But, most important of all, the Hospital and its Trustees knew or should have known that future subventions from the Foundation to the Hos-

pital were jeopardized if the Foundation's principal was touched.

At least two of the Hospital's Trustees and officers had *actual* knowledge that the Foundation could not make subventions from principal (App. 41a). Irrespective of the subjective knowledge of the Trustees of the Hospital, in the exercise of commercially reasonable conduct, they should have known that there was some doubt whether subventions would come from the Foundation's principal. The Hospital and its Trustees should have known that the Foundation's Application to the I.R.S. for tax exempt status consciously limited future distribution to income only. The Hospital and its Trustees should have known that this limitation had been incorporated into the Foundation's Application on the advice of the Foundation's accountants. Thus, as early as 1984, the Hospital and its Trustees should have known that the Foundation's assets had to be maintained closely to avoid dipping into its principal.

In the face of what the Hospital and its Trustees actually knew or should have known, they did nothing. And, when the Hospital's Trustees belatedly reacted, it was far too late to save the Hospital from closure, and even too late to provide the 60-day notice mandated by the WARN Act.

Although the Seventh Circuit premised its holding on the fact that it was not until late February 1990 that any member of either Board became aware of the fact that invading the Foundation's principal might jeopardize the Foundation's tax exempt status, 7 F.3d at 626, the evidence indicated that the Foundation, in drafting its 1985 Application seeking tax exempt status, consciously drafted that document to limit its right to distribute income only (App. 34a). Thus, it was known at the time the Foundation submitted its Application that its ability to assist the hospital financially may have been limited to the income generated by the Foundation, not its princi-

pal. Given these facts, the courts below should have examined whether it was "commercially reasonable" for an employer to allow huge and repeat subventions without anticipating the time when the subventions would invade principal and thus jeopardize the tax-exempt status of the corporation and its very life.

Nonetheless, the Seventh Circuit deferred to the Respondent's subjective belief that it was "commercially reasonable" to remain totally ignorant of a critical limitation placed on what, for the Hospital, was an essential source of funds.

Thus, "reasonable" business judgment would dictate that the Trustees of the Hospital do everything possible to guarantee the continuation of a source of income which had become absolutely essential to the Hospital's existence. Reasonable business judgment would dictate that when the Hospital transferred over $19,000,000.00 in assets to the Foundation that the Hospital's Trustees have a complete understanding of the terms under which those assets would flow back to the Hospital. Yet it was not until February 1990, years after the Hospital had been demanding subventions in excess of $3,000,000.00 a year, that anyone sought to determine the tax ramifications of the Foundation's invasions of principal. At that point, according to the Defendant, it was too late to do anything but shut down the Hospital.

Thus, the fundamental error in the Seventh Circuit's decision in this case is in its reliance on what the Hospital and its Trustees were subjectively aware of, instead of what they should reasonably have been aware of.

Finally, the Seventh Circuit made one other serious error. There was a legitimately important question of whether the invasion of principal legally jeopardized the Hospital's tax exemption. Yet, in applying a subjective test, the Court accepted this key premise of the Respondents, without ascertaining if this premise was the result of "commercially reasonable" business judgment.

II. THE SEVENTH CIRCUIT'S BROAD INTERPRETATION OF THE "FORSEEABILITY" DEFENSE FAILED TO RECOGNIZE THE DOCTRINE OF IMPUTED CORPORATE KNOWLEDGE.

There is another serious error in the decision rendered by the Seventh Circuit which should be examined by this Court. The decision exempted the Hospital from all responsibility for knowledge of its own financial status, despite compelling evidence that critical information was in fact available trustees of both the Hospital and the Foundation at all times since the creation of the Foundation.

The uncontradicted evidence in this case demonstrated that Sherwin Stone and Dr. Algirdas Maciunas, both Trustees of the Hospital, were aware as ear'y as December of 1984, that the Foundation's subventions were not to invade principal. Nonetheless, the Seventh Circuit concluded that the Hospital did not know or have reason to know, until February 1990, that the Foundation had invaded principal. 7 F.3d at 627 (App. 16a). The Seventh Circuit reached this conclusion after rejecting Petitioner's arguments that the Comptroller's prior knowledge of the invasion of principal was changeable to the Hospital:

> True, the Hospital's comptroller, who maintained both the Hospital's and the Foundation's financial records, was aware of the invasion of principal from the inception of the practice. But he never told anyone because he was under the impression that it was alright to invade principal. Because he thought that it was proper for the Foundation to use any monies in the endowment fund for the subventions, including principal, he did not expect the Foundation to decide to stop making subventions because of the invasions of principal.

7 F.3d at 626 (App. 16-17a).

The Seventh Circuit's disposition of this aspect of the case raises a serious question of how knowledge is to be imputed to a corporation.

It is a well established principal of law that a corporation is charged with knowledge of all material facts which one of its agents acquires while acting in the scope of employment. 3 *Fletcher Cyc. Corp.* § 790 (Perm. Ed.). Moreover, this principle of imputed corporate knowledge applies "even though the officer or agent does not in fact communicate the knowledge to the corporation." *Id.*

A corollary of this doctrine of imputed corporate knowledge is that a corporation's "knowledge" represents the cumulative knowledge of information obtained by all of its agents in the course of their employment. *United States v. Osorio,* 929 F.2d 753, 761 (1st Cir. 1991); *Inland Freight Lines v. United States,* 191 F.2d 313, 315 (10th Cir. 1951); *United States v. T.I.M.E.-D.C., Inc.,* 381 F. Supp. 730, 738 (W.D.Va. 1974). As recognized by the First Circuit in *United States v. Bank of New England N.A.,* 821 F.2d 844 (1st Cir. 1987), *cert. denied,* 484 U.S. 943 (1987):

> Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. (citation omitted). Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. *The aggregate of those components constitutes the corporation's knowledge of a particular operation.* It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation:
>
> > [*A*] *corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full*

> *import.* Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.

Id. at 856, *quoting United States v. T.I.M.E.-D.C., Inc., supra* (emphasis added).

The Seventh Circuit's decision is directly at odds with the First Circuit's holding in *Bank of New England.* The Seventh Circuit held that a corporation is not to be construed as having knowledge of a particular fact because the agent who possessed that knowledge was not aware of its significance, and failed to share that knowledge with other corporate agents who could grasp its significance.

The decision rejecting the Comptroller's evidence is erroneous in two respects. First, the Comptroller's knowledge of prior subventions from principal must be imputed to the Hospital, regardless of whether he shared that knowledge with any of the Hospital's agents. Second, by suggesting that the Hospital is not to be charged with the Comptroller's knowledge because that individual did not understand the significance of the information he possessed, opens up the prospect of corporate "immunity" by means of the compartmentalization of knowledge which the First Circuit warned against in *Bank of New England, supra.*

III. THE IMPORTANCE OF THE CASE.

By applying a subjective standard to the concept of forseeability, and by ignoring the doctrine of imputed corporate knowledge, the holding of the Seventh Circuit has far reaching ramifications for all WARN Act litigation.

Since the passage of the WARN Act, thousands of workers have gained advance notice of their layoffs. As the first federal law requiring any notice of plant closings and mass layoffs, Congress took a significant step in providing protection to those about to become dislocated workers. Reports issued by the Economic Policy Institute

and the National Academy of Science, and cited by members of Congress during debate on the bill,[8] all document the economic and psychological benefits of advance notice to workers who are displaced, and to the nation, by reducing the average duration of unemployment and lessening the public costs of such unemployment. For example, Representative Kildee observed that:

> The highly respected Economic Policy Institute found that advance notice requirements would reduce the period of joblessness by almost 4 weeks, would save $400 million in unemployment insurance costs, and would provide $1.5 billion in earnings to displaced workers. The report also cited a number of current studies by the Office of Technology Assessment and the National Academy of Sciences that failed to find evidence of substantial harm to business.[9]

Congress intended the WARN Act to be a broad, remedial statute. *Solberg v. Inline Corp.*, 740 F. Supp. 680, 684-85 (D. Minn. 1990). Yet, many workers who lose their jobs because of a closure or layoff still do not receive advance notice. The General Accounting Office, who conducted a study of employer compliance with the WARN Act in 1993 found: "Even when events appeared to us to meet the WARN criteria, our study showed that many employers did not provide notice." [10] By expanding

---

[8] 134 Cong. Rec. S8454, S8472 (daily ed. June 23, 1988) (statement of Sen. Metzenbaum and Sen. Conrad); 134 Cong. Rec. S8543 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum); 134 Cong. Rec. S4548 (daily ed. April 22, 1988) (statement of Sen. Metzenbaum); 133 Cong. Rec. S9392 (daily ed. July 8, 1987) (statement of Sen. Kennedy), *reprinted in* Legislative History of the Worker Adjustment Retraining Notification Act, 1988, at 203, 204, 222, 251, 509, 686 (1990).

[9] 134 Cong. Rec. H5516 (daily ed. July 13, 1988) (statement of Rep. Kildee), *reprinted in* Legislative History of the Worker Adjustment Retraining Notification Act, 1988, at 168 (1990).

[10] *Dislocated Workers: Implementation of the Workers Adjustment and Retraining Notification Act (Warn) Before the Senate Subcommittee on Labor, Committee on Labor and Human Resources*, February 23, 1993 (Statement of Linda G. Morra, Director, Education and Employment Issues, Human Resources Division).

the "unforseeable business circumstance" exception far beyond the intent of Congress, the results will be far worse. The Seventh Circuit has substantially lightened the burden on employers and the effect of this decision, if left standing, will be to fundamentally restructure the WARN Act and weaken its protections against workers facing imminent job loss.

CONCLUSION

Based on the foregoing, Petitioners, Myrna Jurcev, Stanley Miller, Florence Moore, Rosemary Riordorn and Dr. Cosette Z. Villanaeva, respectfully request that the Court issue a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

KARY L. MOSS
MAURICE AND JANE SUGAR
LAW CENTER FOR ECONOMIC
AND SOCIAL JUSTICE
2915 Cadillac Tower
Detroit, Michigan 48226
(313) 962-6540

MARK GRANZOTTO
(Counsel of Record)
One Kennedy Square
Suite 1814
Detroit, Michigan 48226
(313) 964-4720

Attorneys for Petitioners

Dated: February 11, 1994

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1927, 92-2379

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN, and DR. COSETTE Z. VILLANUEVA,
Plaintiffs-Appellants,

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation, and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,
Defendants-Appellees.

February 18, 1993, Argued
October 14, 1993, Decided

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 C 1798. James B. Zagel, Judge

JUDGES: Before COFFEY and ROVNER, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

OPINION BY: COFFEY

COFFEY, Circuit Judge. The Worker Adjustment Retraining and Notification Act ("WARN" Act) requires

some employers of 100 or more full-time employees to give at least sixty days' advance written notice of plant closings and mass layoffs to affected employees. See 29 U.S.C. § 2102(a) (1988).[1] On February 26, 1990, the Board of Trustees of Central Community Hospital (the "Hospital") voted to close the Hospital on March 14, 1990, and gave the employees written notice of its decision that same day. A class of employees who lost their jobs when the Hospital closed brought an action against the Hospital Central Community Foundation (the "Foundation"), which was the not-for-profit corporation that managed the Hospital's financial affairs, and the Foundation's successor, The Prairie Foundation. The class alleged that: (1) the defendants violated the WARN Act by failing to notify employees that the Hospital would be closing at least sixty days in advance of its scheduled closing on March 14, 1990; and (2) the defendants breached an agreement in the Hospital's employee policy manual and violated the Illinois Wage Payment and Col-

---

[1] The WARN Act provides in pertinent part:

(a) Notice to employees, state dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C.A. § 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

* * * *

(b) Reduction of notification period

* * * *

(2) (A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

lection Act, 820 ILCS 115/1 (1993) et seq., by refusing to pay employees for accumulated sick leave. The district court granted summary judgment in favor of the defendants on the WARN Act claim, ruling that the defendants were not required to give the employees the full sixty days' notice that the Hospital would be closing because the closing was necessitated by business circumstances that were not reasonably foreseeable. See 29 U.S.C. § 2102(b)(2)(A). The court thereafter dismissed the state law claims for lack of subject-matter jurisdiction. The class filed a notice of appeal from the denial of its motion for summary judgment, the grant of the Hospital's motion for summary judgment, as well as certain interlocutory discovery rulings. The district court subsequently ordered the class to pay the Hospital's costs, a sum of $2,314.75. The class appealed from that order. By order dated June 10, 1992, we consolidated the appeals. We affirm the summary judgment and the award of costs.

I. BACKGROUND

A. Facts

The Hospital was an Illinois not-for-profit corporation that was exempt from federal income taxes pursuant to 26 U.S.C. § 501(c)(3) (1988). The Foundation, also an Illinois not-for-profit corporation, was incorporated in December of 1983 to serve as a "support foundation" for the Hospital's benefit pursuant to 26 U.S.C. § 509 (a)(3) (1988). The Hospital's Board of Trustees appointed the Foundation's Board of Trustees.[2] The Foundation's articles of incorporation expressly empowered the Foundation "to receive gifts, devises, bequests and contributions in any form, and to use, apply, invest and re-

---

[2] Four members of the nine-member Board of Trustees of the Hospital also were members of the Foundation's Board of Trustees: Sherwin Stone (the President of the Foundation and general counsel to both the Hosptial and the Foundation), Patrick A. DeMoon, Patrick S. DeMoon, and Dr. Algirdas Maciunas.

invest the principal and/or income therefrom or distribute the same" for the benefit of and to carry out the purposes of the Hospital. In its application for exemption from federal income taxes the Foundation advised the Internal Revenue Service that it proposed to establish an endowment fund with all of the monies received and to use the income generated from the fund to support the Hospital. In December of 1984 the Internal Revenue Service issued a letter stating that the Foundation was exempt from federal income tax "based upon information supplied and assuming [its] operations will be as stated in [its] application." The Board of Trustees of the Hospital thereafter transferred the Hospital's entire investment portfolio (assets in excess of 19 million dollars) to the Foundation. Between November 4, 1985, and January 22, 1990, the Foundation made a total of $11,950,000 in unrestricted subventions to the Hospital. The Hospital's financial condition was in such grave condition that the Hospital depended on the Foundation's subventions to cover its losses and remain open.

After the January 22, 1990, subvention the Foundation's president, Sherwin Stone, requested that the Hospital's comptroller prepare a list of all subventions paid to date. When Stone received the report he learned that the Foundation's subventions to the Hospital were in excess of the Foundation's earnings and thus had invaded principal. Stone relayed the information to the Hospital's administrator on February 19, 1990, and a meeting of the Hospital's Board of Trustees was convened shortly thereafter. During this meeting Stone advised the Board that the question whether the invasions of the principal would impair the Foundation's tax-exempt status and other legal issues were being researched, and that he would report back to the Board as soon as he had an answer. He further informed the Board that, in light of the uncertain legality of the Foundation's invasion of principal, the Foundation might very well be precluded

from making further subventions in excess of income until past invasions of principal were repaid.

Stone subsequently discussed the legal issues with the other attorneys in his firm and the tax issues with the accounting firm that represented both the Hospital and the Foundation. The attorneys provided Stone with a written memorandum of law which concluded that further subventions in excess of income might very well jeopardize the tax-exempt status of the Foundation and expose the individual members of the Foundation's Board of Trustees to liability for breach of their fiduciary duties. The memorandum recommended that no further subventions be made until a ruling was obtained from the Internal Revenue Service permitting or prohibiting further invasions of principal, a process that might conceivably require a number of months. After a series of conversations with Stone, the tax consultant agreed with the conclusions the attorneys reached.

The Foundation's Board of Trustees met on the morning of February 26, 1990, and Stone reported to the Board what the attorneys and accountants had advised. The Board voted to cease making subventions to the Hospital until the Hospital repaid the invasions of the principal, or the Foundation earned sufficient monies to offset the invasions, or the Foundation received a ruling from the Internal Revenue Service permitting the payment of principal to the Hospital. That afternoon the Hospital's Board of Trustees convened, and Stone apprised them of the situation. Stone included in his briefing to the Hospital's Board the Foundation's resolution to halt further subventions unless one of the three conditions set forth by the Foundation's Board was met. The Board debated the alternatives and heard from the Hospital's administrator who projected that, based on its current cash receipts, the Hospital could remain open only for approximately two more weeks. The Board, faced with the Foundation's ultimatum and the adminis-

trator's report, voted to close the Hosiptal effective March 14, 1990, and immediately began to notify employees of the impending closure.

Later on February 26 the Hospital's departmental heads met. The departmental heads were apprised of the Hospital's dire financial condition and were given written copies of a letter from the Hospital's administrator announcing the closure of the Hospital effective March 14, 1990, and explaining the necessity of the early date of closure. The departmental heads were instructed to return to their departments and tell their employees of the closure. Copies of the letter were posted throughout the Hospital. The closure was publicly announced on February 26 and news stories appeared in the media the following day. The Hospital also gave each employee a copy of the letter in the envelope containing his March 8, 1990, paycheck. The Hospital closed on March 14, 1990, as scheduled.

B. Proceedings in the District Court

The class filed a complaint in the United States District Court for the Northern District of Illinois on March 28, 1990, in which it named the Hospital as the sole defendant. It alleged that the Hospital had violated 29 U.S.C. § 2102(a), by failing to give its employees sixty days' advance notice that it was closing.[3] The Hospital conceded that it had not given its employees the sixty-days' advance notice of closure but claimed that it was not required to do so because the closure was caused by the Foundation's decision to discontinue making subventions to the Hospital, and this decision was "not reasonably foreseeable at the time the notice would have been re-

[3] The class also claimed that the Hospital breached an agreement in the Hospital's employee policy manual and violated the Illinois Wage Payment and Collection Act, 820 ILCS 115/1 (1993) et seq., by refusing to pay employees for accumulated sick leave, but the merit of those claims is not on appeal.

quired." 29 U.S.C. § 2102(b)(2)(A). The class sought to discover, among other things, documents relating to the number of patients that the Hospital admitted from 1986 to 1990 and the Hospital's income and liabilities during that period of time, as well as documents relating to the financial condition of the Hospital after February 28, 1990. In October of 1990 the court issued a protective order restricting disclosure to the public of confidential documents relating to the Hospital's income, liabilities, and admissions. (The court subsequently amended the protective order on November 2, 1990, and again on March 20, 1992.) In a February 1, 1991, ruling the court denied discovery of the post-closure financial documents.

The Hospital moved for summary judgment in June of 1991. Before the motion was decided, the class obtained leave to amend its complaint and added the Foundation as a defendant. The district court ordered that an answer not be filed pending disposition of the motion for summary judgment. The class never served the Foundation with process and, as such, the Foundation did not file an appearance or pleading or participate in the defense of the case. The class subsequently filed a cross-motion for summary judgment. On March 5, 1992, the district court granted the Hospital's motion for summary judgment, denied the class' motion for summary judgment, and dismissed the state law claims for lack of subject-matter jurisdiction. The court concluded that based upon the record before it the Hospital was not required to give its employees sixty-days' advance notice that the Hospital was not required to give its employees sixty-days' advance notice that the Hospital was closing because: (1) the Hospital's loss of subventions from the Foundation was a "business circumstances" that "caused" the Hospital to close within the meaning of 29 U.S.C. § 2101(b)(1)(A); (2) the Foundation did not receive definitive advice that further subventions might be im-

proper until February 26, 1990; (3) the Hospital's Board of Trustees did not have advance notice that the subventions might be improper; and (4) the undisputed facts established that on January 14, 1990, sixty days before the Hospital closed, the Hospital could not have reasonably foreseen that the Foundation would cease making subventions. The court entered judgment in favor of the Hospital on March 6, 1992. On March 20, 1992, the court modified the judgment to include the dismissal of the amended complaint against the Foundation. Finally, on May 15, 1992, the district court awarded the Hospital $2,314.75 in costs to be assessed against those members of the class named in the complaint.

II. ISSUES

We are called upon to resolve four issues. The first two involve the district court's finding in the summary judgment proceeding that 29 U.S.C. § 2102(b)(2)(A), excused the Hospital from the requirement of giving its employees sixty days' advance notice prior to closing: whether the district court properly concluded that the Foundation's decision to cease making subventions to the Hospital caused the Hospital to close, and whether the district court commited error in finding that the Foundation's decision to cease making subventions to the Hospital was not reasonably foreseeable on January 14, 1990, sixty days before the Hospital closed. The third issue is whether the district court's rulings limiting the scope of discovery constituted an abuse of its discretion. Finally, the fourth issue is whether the district court abused its discretion in assessing costs only against those members of the class named in the complaint rather than against all members of the class. We consider these issues in turn.

III. DISCUSSION

A. 29 U.S.C. § 2102(b)(2)(A)

As a preliminary matter we address the parties' disagreement on the proper standard of review of the district court's grant of sumary judgment in favor of the Hospital. The class submits that we should review the judgment de novo; the Hospital counters that our review should be under the clear error standard. Generally we review grants or denials of summary judgment de novo. Carston v. The County of Cook, 962 F.2d 749, 751 (7th Cir. 1992); Pro-Eco, Inc. v. Board of Comm'rs, 956 F.2d 635, 637 (7th Cir. 1992). Nevertheless, recent decisions of this court have held that where the grant of summary judgment merely entails the application of a legal standard to undisputed facts, and the party opposing summary judgment does not claim a right to a jury trial, we review the summary judgment for clear error. See Central States, Southeast and Southwest Areas Pension Fund v. Slotky, 956 F.2d 1369, 1373 (7th Cir. 1992) ("The application of a legal standard to undisputed facts is classified as a fact for purposes of delimiting the respective spheres of trial and appellate court. . . . We defer to the fact finder's application just as we do his findings with regard to the facts to which to apply the standard. In either case the appellate standard is clear error."); accord Central States Pension Fund v. Personnel, Inc., 974 F.2d 789, 792 (7th Cir. 1992); St. Mary's Medical v. Disco Alum. Prods., 969 F.2d 585, 588-89 (7th Cir. 1992). We recognize that the introduction of the clearly erroneous standard of review to summary judgment cases has thus far been limited to cases in which (1) the facts are undisputed, (2) the trial court is merely applying the law to the facts, and (3) the nonmoving party has made no request for a jury trial. While this new standard causes us some concern, we need not resolve any conflict between the competing standards in this case because

the class cannot prevail under either de novo or clearly erroneous review.

The questions resolved by the district court, whether the Foundation's decision to cease making subventions to the Hospital and whether the Hospital's Board of Trustees had advance notice of the Foundation's decision, were applications of the legal standard set forth in 29 U.S.C. § 2102(b)(2)(A) ("closing or mass layoff caused by business circumstances that were not reasonably (foreseeable"). The question before us is whether based on undisputed facts the Hospital was entitled to judgment as a matter of law. Before the district court, both the class and the Hospital claimed a right to judgment as a matter of law. On appeal, the class maintains that there are disputed issues of fact. Thus as we avoid resolving any alleged factual disputes in this appeal from a grant of summary judgment, we "view the record and all inferences drawn from it in the light most favorable to" the class. Carston, 962 F.2d at 751. We therefore determine whether there is any " 'genuine issue as to any material fact' " and whether the Hospital " 'is entitled to judgment as a matter of law.' " Id. (quoting Fed. R. Civ. P. 56(c)); see Preze v. Board of Trustees, Pipefitters Welfare Fund Local 597, 1993 U.S. App. LEXIS 24539, No. 92-1791 (7th Cir. Sept. 22, 1993) (applying de novo review to a grant of summary judgment on undisputed facts).

1. Causation

On February 26, 1990, the Foundation's Board of Trustees voted to cease making any more subventions to the Hospital because the prior subventions had invaded the principal of the endowment fund and the Board had been advised by its attorneys as well as its accountants that invading the principal might cause the Foundation to lose its tax-exempt status and might be deemed a wasting of the Foundation's assets. Later that same day the Hospital's Board voted to close the Hospital effective

March 14, 1990, based upon the Foundation's decision to cease making subventions. Thus the decision to cease making subventions to the Hospital at least in one sense "caused" the Hospital's Board of Trustees to vote to close the Hospital. The class argues that the Foundation's decision to cease making subventions did not "cause" the Hospital to close on March 14, 1990, as that term is used in 29 U.S.C. § 2102(b)(2)(A), because the Hospital's Board of Trustees should have realized the Foundation's conclusion that it could not invade the principal of the endowment fund to make the subventions was based on erroneous legal and tax advice and, as such, the Hospital's Board should not have "blindly accepted" the Foundation's decision. Instead of accepting the Foundation's conclusion that it could not invade principal to make subventions, the class argues, the Hospital's Board should have challenged the authority of the Foundation to cease making subventions because the Foundation's articles of incorporation permitted the invasion of principal for subventions. This argument is premised on the faulty assumption that the Hospital's Board controlled the Foundation and thus could have forced the Foundation to continue making subventions. We agree with the district court that the Hospital did not have control over the Foundation. True, all four members of the Foundation's Board also were members of the Hospital's Board. But it is clear that each member of the Foundation's Board owed an independent fiduciary duty to the Foundation. Moreover, because the Hospital's Board had a total of nine members, the four did not comprise a majority of the Hospital's Board. The Hospital's sole power over the Foundation's Board was to appoint all of its members each year. The Hospital had no power to remove or suspend a member of the Foundation's Board, or to veto the Board's decisions.

The class likens the relationship between the Hospital and the Foundation to one between a parent company and

a wholly-owned subsidiary. It points out that the Foundation's books and financial records were housed at the Hospital and maintained by the Hospital's comptroller and that the Foundation had no site or mailing address separate and distinct from the Hospital. It notes that, to maintain its tax-exempt status the Foundation had to be "operated, supervised, or controlled by" the Hospital. 26 U.S.C. § 509(a)(3)(A-C) (1988); 26 C.F.R. § 1.509 (a)-4(g) (1993). Yet it is clear from the Foundation's application for tax-exempt status filed with the Internal Revenue Service that the Hospital's control over the Foundation did not enable it to mandate that the Foundation continue to make subventions from the endowment fund: [Question on the Application] To what extent does the supported organization have a significant voice in your investment policies, the making and timing of grants, and in otherwise directing the use of your income or assets? [Foundation's Answer] The supported organization has no direct voice over the Foundation's investment policies, grants or use of income, except through its right to appoint the Trustees of the Foundation annually. The Internal Revenue Service granted the Foundation tax-exempt status "assuming [the Foundation's] operations will be as stated in [the] application for recognition of exemption."

The class also refers us to 20 C.F.R. § 639.3(a)(2) (1992), which lists factors for determining whether "independent contractors and subsidiaries which are wholly or partially owned by a parent company" are to be treated as separate employers or as a part of the parent. It argues that application of the factors to the relationship between the Hospital and the Foundation compel a finding that the Foundation and the Hospital must be treated as a single entity. Nevertheless, 20 C.F.R. § 639.3(2) is of little help to the class because it begs the question in the action before us, whether the Hospital controlled the Foundation: one of the listed factors is whether the parent company exercises control over the subsidiary.

The class further argues that the cessation of subventions did not "cause" the Hospital to close because the Hospital had sufficient funds to stay open for sixty days even without the subventions. It submits that the WARN Act required the Hospital to demonstrate both an unforeseeable circumstance that forced its closure and that its closure could not be delayed for sixty days from February 26, 1990. The district judge disagreed, stating that "the WARN Act does not in my view require the Hospital to search for ways to stay open when confronted with a complete loss of its principal source of income." While the court's finding that the subventions were the Hospital's principal source of income appears to be incorrect (the Hospital had gross operating revenues of over $20 million in 1989), there is no dispute that the Hospital depended on the subventions to remain afloat: from 1985 to 1990 the Hospital operated at a loss of about three million dollars per year. Yet we need not conduct a detailed analysis of the Hospital's balance sheet to conclude that because the Hospital did not show that it had insufficient assets to remain open for sixty days from February 26, 1990, it could not rely on the "unforeseen business circumstances" exception. Neither the WARN Act nor its accompanying regulations saddle an employer with the burden of making such a showing. The regulations state that the employer bears the burden of demonstrating that the conditions for the exception have been met, but neither the regulations nor the WARN Act articulate as one of the conditions that the employer be able to demonstrate that it has insufficient assets to remain open for sixty days. Furthermore, the only federal court that has considered the issue has found that an unforeseen business circumstance can be sufficient cause for a plant to close if the plant can no longer operate profitably. See Jones v. Kayser-Roth Hosiery Inc., 748 F. Supp. 1276, 1286 (E.D. Tenn. 1990). Here, the Hospital's comptroller estimated that had the Hospital remained open without the Foundation's funding the Hospital would have had a

negative cash balance of over $300,000 by March 22, 1990, only eight days after the Hospital closed.

The class purports to find support for its position in the legislative history of the WARN Act. A House of Representatives Conference Report states that the "unforeseeable business circumstances" exception should apply only where "it is not economically feasible to require the employer to give notice and wait until the end of the notice period before effecting the plant closing or mass layoff." H.R. Rep. No. 100-576, 100th Cong., 2nd Sess., 1049 (Apr. 20, 1988), reprinted in 1988 U.S.C.C.A.N. 2082. The class submits that it is "economically feasible" for an employer to stay open or pay its employees for sixty days if it can come up with enough money to do so by selling its assets and deferring its payables. Legislative history may on occasion be useful in interpreting ambiguous language, but the class has not been able to come forward with any ambiguous language in the WARN Act that this statement might help decode. See Lincoln v. Vigil, 124 L. Ed. 2d 101, 113 S. Ct. 2024, 2031-32 (1993) (legislative history divorced from statutory text has no significance); Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501, 99 L. Ed. 2d 582, 108 S. Ct. 1350 (1988) (same). Thus the legislative history cited by the class is of no significance. The WARN Act fails to support the class' position. We therefore agree with the conclusion of the district court that the Hospital was not required to establish that it had insufficient assets to remain open for sixty days after February 26, 1990.

In sum, we agree with the district court that the Foundation's decision to cease making subventions to the Hospital "caused" the Hospital to close on March 14, 1990, within the meaning of 29 U.S.C. § 2102(b)(2)(A). The Hospital did not control the Foundation and, as such, was in no position to compel the Foundation to continue making subventions. Moreover, the WARN Act did not com-

pel the Hospital to demonstrate that it had insufficient assets to remain open for sixty days after the Foundation decided to cease making subventions. We now turn to the question whether the Foundation's decision was not reasonably foreseeable.

2. Foreseeability

Even if the Foundation's decision to discontinue making subventions to the Hospital caused the Hospital to close, the Hospital was not excused from complying with the WARN Act's requirement that it give its employees sixty days advance notice of its closing unless the Foundation's decision was "not reasonably foreseeable" on January 14, 1990, the date on which notice of the closure would have been required. See 29 U.S.C. § 2101(b)(2)(A). "An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1) (1992). We have previously in this opinion expressed our agreement with the district court's conclusion that the Foundation's decision to discontinue making subventions was beyond the control of the Hospital. The class contends that the district court erroneously ruled that the Foundation's decision was sudden, dramatic, and unexpected.

We disagree with the class. Seven members of the Hospital's Board of Trustees testified during their depositions that they did not know of the Foundation's decision to discontinue making subventions until February 26, 1990, (the class did not depose the other two members of the Hospital's Board). And it was not until late February of 1990 that anyone on either Board became aware that dipping into principal to make the subventions might have violated the terms of the Internal Revenue Service's grant of tax-exempt status to the Foundation. The class submits that the Foundation's decision to dis-

continue making subventions was neither sudden, dramatic, nor unexpected because the Board had long been aware of the events that ultimately led to the Foundation's decision. According to the class, the Hospital's Board should have been aware that the Foundation would stop making subventions when the Board decided to transfer its entire investment portfolio to the Foundation and thereby become financially dependent on the Foundation. The class argues that some disruption in funding from the Foundation was reasonably forseeable. The class also claims that well before January 14, 1990, the Hospital should have known from the audited financial statements of the Hospital and the Foundation that the Foundation would stop making subventions. These statements demonstrated that the Hospital was operating at a substantial loss and that, as of October 18, 1989, the Hospital received its subventions from the principal of the endowment fund.

The Hospital Board's awareness of these circumstances did not render the Foundation's February 26, 1990, decision to stop making subventions reasonably foreseeable. The financial statements of the Foundation and the Hospital that would have alerted the Hospital's Board to the fact that the Foundation was dipping into principal to make subventions to the Hospital were not available to the Board until well after January 14, 1990. The financial statements were not generated daily, but annually, at the end of each fiscal year. The fiscal year ran from July 1 to June 30. The first subvention that invaded principal was made on October 18, 1989, and the second and final subvention that invaded principal was made on January 22, 1990. The statement that reflected those two subventions was prepared in June of 1990 at the earliest, which was three months after the Hospital closed. True, the Hospital's comptroller, who maintained both the Hospital's and the Foundation's financial records, was aware of the invasion of principal from the inception of the

practice. But he never told anyone because he was under the impression that it was alright to invade principal. Because he thought that it was proper for the Foundation to use any monies in the endowment fund for the subventions, including principal, he did not expect the Foundation to decide to stop making subventions because of the invasions of principal.

Likewise, the class' contention that the Hospital should have known that the Foundation would discontinue making subventions because the Hospital had elected to become dependent on the Foundation for financial support is without merit. "The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market." 20 C.F.R. § 639.9 (b)(2) (1992). The class fails to make a persuasive argument that the Hospital's decision to transfer its investment portfolio to the Foundation can be characterized as an exercise of unreasonable business judgment. The most that the class can show is that, in retrospect, the decision to become financially dependent on the Foundation might have been unwise. That is a far cry from showing that the decision was so unreasonable that it rendered the Foundation's decision to cease making subventions six years later foreseeable.

In sum, the district court properly ruled that the Foundation's February 26, 1990, decision to cease making subventions to the Hospital was not reasonably foreseeable on January 14, 1990. We agree with the district court's conclusion that the Foundation's decision was sudden, dramatic, and unexpected because no one on the Hospital's Board knew or had reason to know until February of 1990 that the Foundation had invaded principal in making subventions to the Hospital or that the invasions of principal might have jeopardized the Foundation's tax-

exempt status, and no one on the Hospital's Board knew or should have known until February 26, 1990, that the Foundation would cease making subventions.

B. Discovery Rulings

The class contends that the district court improperly refused to compel the Hospital to respond to certain interrogatories and to produce certain documents. Specifically, the class claims that it was unjustly denied information about: (1) reasons for the Hospital's closure other than the one proffered by the Hospital; (2) loans that the Hospital made to Franklin Community Hospital; and (3) the post-closure financial condition of the Hospital. "District courts have broad discretion in matters related to discovery. . . . On review, courts of appeal will only reverse a decision of a district court relating to discovery upon a clear showing of an abuse of discretion." Dole v. Local 1942, IBEW, AFL-CIO, 870 F.2d 368, 371 (7th Cir. 1989) (citations omitted). We will not disturb a trial judge's exercise of discretion unless it is established that the denial of the requested discovery "would result in actual and substantial prejudice to the complaining litigant." Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738, 744 (7th Cir. 1985).

The district court's discovery rulings did not actually and substantially prejudice the class. First, the class was permitted discovery of the question why the Hospital closed and the role the Hospital's loan to Franklin Community Hospital played in the closure. In September of 1990 the district court directed the class to depose the Hospital's Trustees as a first step in the discovery process. By February 1, 1991, the class had not yet deposed the Trustees because it claimed that, without certain financial statements and records of the Hospital's admission of patients, it could not inquire into possible reasons why the Trustees voted to close the Hospital. The court again directed the class to depose the Hospital's Trustees to

learn what facts the Trustees had before them when they voted to close the Hospital:

Do your discovery. Do your depositions of the people of the foundation and people at the hospital. You are entitled to have what they had before them when they made their decision, which is whatever audit or financial statements they had.

* * * *

Ask them first. And you have got the position of the other side, which is that they're going to rely on the Central Community Foundation refusing to give them money. And that's really the only issue.

* * * *

If that's not the reason, if it's an incredible assertion, if after you have done this deposition, you see holes in their story, fine.

* * * *

Depose the people, hear what they have to say, and then come in and talk to me about what it is. R.O.A. 45, at 11-12, 15-16 (Transcript of Feb. 1, 1991, motion to compel discovery).

Near the end of the hearing class counsel clarified what he intended to ask the Hospital's Trustees:

In a deposition I would ask [the Hospital's Trustees] what were the patient admissions? Were they declining? I would anticipate at that point an objection. The purpose of this line of questioning is to show, one, declining patient admissions was a reason [to close the Hospital]; two, DRG payments was a reason; three the uncollectibility of the [FBCH] loan was a reason. Id. at 14.

The court responded:

What you want to do and what you are entitled to do is probe their state of mind as to why they [the Founda-

tion's Trustees] made the decision [to close the Hospital] and what the basis of that decision was. And if you ask them if there is any other reason, if you ask them did they consider the DRG's, did they consider the decline in patient admissions, did it play a factor in their decision, that's fine. You can ask those questions. Id. at 17-18.

Thus the court permitted the class to make the inquiries about the reasons for the Hospital's closure that it sought to make. The court ruled that the class had not yet shown that it was entitled to the documents it sought, not that the class was outright unentitled to examine the documents. The court was willing to compel production of the documents after the class demonstrated a need for them. The class ultimately deposed seven of the nine members of the Hospital's Board of Trustees as well as the Hospital's comptroller, but did not subsequently accept the court's invitation to report on what occurred or request the information that it had been denied.

The other information the class sought to discover—information concerning the Hospital's post-closure financial situation—was irrelevant. The class sought to use the information to assess the Hospital comptroller's projection that, had the Hospital remained open, it would have had a negative cash balance of over $300,000 by March 22, 1990. The class did not dispute that the Hospital's Board of Trustees actually relied on the projection in voting to close the Hospital. It wanted access to information about the Hospital's financial affairs to determine whether the comptroller ultimately was correct. Nevertheless, the issue in this case is not the accounting skills of the Hospital's comptroller, but rather whether the Hospital's Board exercised reasonable business judgment in relying on the projection as of January 22, 1990, the day on which notice would have been required. See 20 C.F.R. § 639.9(b)(2) (1992). Only information that the Board had before it before the closure was relevant. The class therefore was not actually and substantially prejudiced

by the district court's refusal to allow discovery of the Hospital's post-closure financial affairs.

C. Assessment of Costs

Finally, the class argues that the district court abused its discretion in assessing costs only against those members of the class who were named in the complaint rather than against all members of the class.[4] We disagree. Although the general rule is that the entire class should share the costs of litigation, see Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970), the rule should not be applied in a narrow and technical manner. See Thomas v. Honeybrook Mines, Inc., 428 F.2d 981, 985 (3d Cir. 1970). Here the court saddled the active members of the class with all the costs of the litigation because it found (and the class does not challenge) that a significant number of the unnamed members could not bear liability for costs. The basis for the court's decision is reasonable, and therefore we are of the opinion that the decision was not an abuse of the court's discretion.

IV. CONCLUSION

The district court's grant of summary judgment in favor of the Hospital and its order awarding the Hospital $2,314.75 in costs are AFFIRMED.

---

[4] The class also argues that the district court abused its discretion in awarding costs without requiring the Hospital to file a supporting affidavit as required by 28 U.S.C. § 1924 (1988). The class waived this argument for purposes of this appeal by failing to object to the absence of an affidavit in the district court. See Kensington Rock Island Ltd. v. American Eagle Historic Partners, 921 F.2d 122, 123 (7th Cir. 1990).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 1798

MYRNA JURCEV, *et al.*,
Plaintiffs,
v.
CENTRAL COMMUNITY HOSPITAL, an Illinois corporation,
Defendant.

[Filed May 5, 1992]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

92-1927

APPEARANCES:

For the Plaintiff:

PUCHALSKI, KEENAN & REIMER, by
MR. PATRICK KEENAN
20 North Wacker Drive
Suite 1700
Chicago, Illinois 60606

For the Defendant:

LAW OFFICES OF JAMES S. MONTANA, JR., by
MR. JOHN A. DIENNER, III, Of Counsel
100 West Monroe Street
Suite 1800
Chicago, Illinois 60603

[2] THE CLERK: 90 C 1798, Jurcev, et al., v. Central Community Hospital.

MR. KEENAN: Good morning Your Honor. Patrick Keenan on behalf of the plaintiffs.

MR. DIENNER: John Dienner on behalf of Central Community Hospital.

THE COURT: I have before me a motion for summary judgment by Central Community Hospital. This action—if you want to be seated, you may want to because this is going to take a few moments.

This action arises under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. Section 2101 (the WARN Act). I have jurisdiction pursuant to 28 U.S.C. 1331, and the supplemental jurisdiction is invoked over the related counts.

There is essentially a three-count class action filed in March of 1990. It alleges violations of the WARN Act, alleges breach of contract, and then some violations of the Illinois Wage Payment and Collection Act. Both parties have moved for summary judgment.

There are no material facts in dispute. There is some dispute as to what implications are to be drawn from the facts, but the material facts are not essentially in dispute.

Central Community Hospital was an Illinois not-for-profit corporation located in Chicago. It was, as is usually the case, exempt from federal income tax. Plaintiffs were [3] employees of the Hospital in various positions.

Central Community Foundation was incorporated in 1983 and was formed by resolution of the Board of Trustees of the Hospital as a supporting foundation. The Foundation's Articles of Incorporation permitted it to invest and distribute both principal and earnings for the benefit of the Hospital. However, the Foundation specifically advised the Internal Revenue Service in its exemption application that it would not distribute principal to the Hospital if exempt status were conferred. The Foundation established an endownment fund to produce income which was periodically subvented to the Hospital.

The Foundation was issued an exemption letter by the IRS at the end of 1984 "based upon information supplied and assuming your operations will be as stated in your application."

The Hospital trustees then transferred the Hospital's entire investment portfolio (assets somewhere in excess of 19 million dollars) to the Foundation. The Foundation made some unrestricted subventions to the Hospital from December 1984 until January 22, 1990, in unscheduled payments, made over a period of time—made in installments, totaling approximately three million dollars a year.

The Hosptial's financial condition had been deteriorating for several years before its closure in March of 1990. The Hospital was in fact dependent upon the Foundation's subvention [4] to cover its losses and remain open.

Sometime in February 1990 the Foundation's president, Sherwin Stone, requested that the comptroller of the Hospital prepare a list of all subventions to date. When Stone received the report, he learned that the Foundation's subventions to the Hospital had exceeded the Foundation's earnings and had invaded the principal. Stone told the Hospital's administrator, P.S. DeMoon, of the invasions of principal, and a meeting of the Hospital Board was convened on February 19, 1990.

During the February 19, 1990, meeting Stone advised the Hospital Board that the legal and tax consequences of the evasion of principal were being researched and that he would report back to the Hospital Board. He further informed the Board that the Foundation might be precluded from making further subvention in excess of income until past invasions of principal were repaid.

After this Stone discussed the legal issues with attorneys at his firm and the tax issues with the accounting firm representing the Hospital and the Foundation. The attorneys provided Stone with a written memorandum of law which concluded that further subventions in excess of income may jeopardize the tax exempt status of the Foundation and may result in personal liability against the individual Foundation Board members for breach of their

fiduciary duties. In a series of conversations with Stone the tax consultant confirmed the conclusions reached [5] by the attorneys.

February 26th, 1990, the Foundation Board of Trustees met and Stone reported what the attorneys and accountants had advised him. Not surprisingly the trustees resolved to cease making subventions to the Hospital until the Hospital repaid the invasions of the principal, or the Foundation earned sufficient monies to offset the invasions, or the Foundation received a ruling from the IRS permitting the payment of principal to the Hospital.

Also on that date the Hospital Board convened and Stone apprised them of the situation, and included in his briefing to them news of the Foundation's resolution to halt further subventions. The Hospital Board debated the alternatives and heard from the Hospital director, Mr. DeMoon, who reported that the Hospital could stay open for approximately two weeks based on the current cash receipts. The Hospital trustees then voted to close the Hospital effective March 14, 1990, and immediately began to notify the Hospital employees of the impending closure.

On February 26th the Hospital convened another meeting—this time of the department heads. The department heads were apprised of the situation and given written copies of a letter by P.S. DeMoon announcing the closure of the Hospital on March 14, 1990. The department heads were instructed to return to their departments and advise their employees of the closure. [6] Copies of the letter were posted throughout the Hospital. The closure was publicly announced on February 26th and printed stories appeared in the media the following day.

Some additional notice was also provided in the form of slips in the next pay envelope, the next pay envelopes of all the employees. That I believe was on March 8, 1990. And the Hospital did in fact close on March 14, 1990.

Section 2102 of the WARN Act says, among other things, that:

> "An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order to each representative of the affected employees as of the time of the notice or, if there is no representative at that time, to each affected employee."

There is no dispute here that on February 26, 1990, there was a "plant closing" due to the Hospital's closure, or that the plaintiffs were "affected employees" or that the employees suffered an "employment loss" under the Act. And the defendants obviously are not contending that they provided 60-day notice as the WARN Act requires.

Rather, they contend that "unforeseen business circumstances" excused it from giving the required 60-day notice to its employees under the WARN Act.

[7] 2102(b)(2)(A) of the WARN Act allows such a reduction of the notification period and it provides:

> "An employer may order a plant closing or a mass layoff before the conclusion of the 60-day period if the closing or mass layoff was caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

The Hospital's loss of financial support from the Foundation qualifies as a "business circumstance" under the Act. The Department of Labor has identified loss of financing as an example of an unforeseeable business circumstance under the Act. This appears in Vol. 54 of the Federal Register, No. 75, at page 16062.

Essentially from 1985 to 1990 the Hospital was functioning at over three million dollars in losses per year. It stayed afloat essentially only because of the Foundation's periodic subventions. The WARN Act does not in my view require the Hospital to search for ways to stay open when confronted with a complete loss of its principal source of income.

The sole issue in this case is whether the Hospital trustees had advanced notify of the Foundation's decision to cease making subventions. After examining the entire record in the light most favorable to the plaintiffs, I conclude the Hospital trustees did not have advance notice.

There are not a lot of cases involving "unforeseen business [8] circumstances." Jones v. Kayser-Roth Hosiery, 748 F. Supp. 1276, from the Eastern District of Tennessee, is one. I don't know if there's another.

They as the defendant-employee was a supplier of nylon hosiery to J. C. Penney, which accounted for 40 percent of the defendant's sales volume. They had quality control problems. J. C. Penney took some of its business away and warned that if there was no improvement in quality, more drastic action would follow. Defendants in that case formed a task force and did a little better. Future quality control audits by J. C. Penney were mixed —some hose passed and some did not.

However, on May 25, 1989, J. C. Penney suddenly canceled all orders from the defendant. Defendant could not stay open with the reduced order and gave less than 60-day notice to its employees.

The district court held in that case that the loss of J. C. Penney was an unforeseeable business circumstance, allowing a reduction in the notification period under the Act.

I think the facts here really compel the same result.

Plaintiffs deposed seven of the nine Hospital trustees, but elicited no testimony that any of them knew that the Foundation had disbursed principal to the Hospital prior to February 1990. On February 26th, 1990, when the Foundation first received *definitive* legal and tax advice that future subventions would be improper, they resolved to cease subventions.

[9] Of particular interest to me is the notification of the opinion of counsel that not only exempt status would be lost, but that personal liability might be imposed. Generally speaking, the most stunning piece of news that

can ever be set forth in any meeting of any board of trustees is that which involves the words "personal" liability. It usually causes fairly drastic action on the part of all involved.

But February 26th, 1990, is clearly that time when the Foundation first received *definitive* advice that future subventions would be improper, and on that day they resolved to cease the subventions.

On the same day the Hospital Board voted to close the Hospital and proceeded to notify its employees.

I do not believe that a case can be made for any trier of fact that the loss of funding was not reasonably foreseeable under the Act. It was sudden, dramatic, and unexpected action outside the Hospital's control.

The Foundation's action was even more sudden, dramatic and unexpected than that which occurred in the J. C. Penney case which I just cited. In the J. C. Penney case at least there was some warning that things may go wrong.

The plaintiffs make, to defeat this argument, broad allegations that the Hospital Board members could have reasonably foreseen the Foundation's decision to discontinue subventions, but they really cite no facts in the record to [10] support any such knowledge by the Hospital trustees, and I think under the Anderson v. Liberty Lobby they have not made an adequate showing.

Plaintiffs' contentions are essentially premised on the argument that the Hospital controlled the Foundation and, thus, could have foreseen and prevented the cutoff in funding. The plaintiffs say the relationship between the Hospital and the Foundation was essentially as one between a parent company controlling a wholly-owned subsidiary.

I think the analogy is unpersuasive because the Hospital Board's sole power was to make annual appointments to the Foundation Board; once Foundation Board members were appointed, they owed an independent fiduciary duty to the Foundation, and they did not comprise

a majority of the nine seat Hospital Board; and both the Foundation and the Hospital were independent not-for-profit organizations, not companies which in any legal sense controlled one another.

The plaintiffs' argument that the Foundation could have continued subventions without jeopardizing its tax exempt status is irrelevant. The Hospital could not change the Foundation's tax status or force it to continue payments. The Foundation, which is not a party to this suit, acted independenly of the Hospital in passing its resolution and the Hospital trustees had no advance notice of it.

I guess the last suggestion of the plaintiffs is that [11] because the Hospital Board knew the Foundation's support was critical to its continued operation, it should reasonably have expected the Foundation would "take some action . . . cutting off that support," but this allegation lacks any grounding in fact and demonstrates, I think, to me that there is no triable issue of fact in this lawsuit.

The defendant has shown as a matter of law that the Foundation's resolution to discontinue subventions to the Hospital was a business circumstance not foreseeable on January 14, 1990, 60 days before the Hospital closed.

Furthermore, the Hospital Board immediately gave notice to its employees on February 26th explaining the Hospital had lost its funding and that the Board voted that day to close the Hospital effective March 14, 1990.

Section 2102(b)(3) provides:

> "An employer relying on this [business circumstance defense] subsection shall give as much notice as is practicable and at the time shall give a brief statement of the basis for reducing the notification period."

The Hospital trustees gave notice to the Hospital employees on February 26th, the same day they voted to close the Hospital, essentially the same day they knew that the funding would not be continuing. The notice provided that—and I quote:

[12] "Until yesterday the Hospital had been receiving substantial economic assistance from Central Community Foundation, a charitable foundation.

"The Foundation has now advised the Hospital Board of Trustees that it cannot provide the Hospital with further financial assistance in the foreseeable future. Without the Foundation's assistance the Hospital will not have sufficient funds to continue its operations."

This notice comported with the timing and content requirements of 2102(b)(3).

I believe the defendant is thus entitled to summary judgment regarding the WARN Act count.

Counts II and III of the complaint, which sound in breach of contract and violation of the Illinois Wage Payment and Collection Act, I'm dismissing for lack of subject matter jurisdiction. These supplemental claims are contingent on the Court's federal question jurisdiction over the WARN Act count. Since all the named plaintiffs are residents of Illinois, there is no independent basis for diversity jurisdiction.

Thus, I'm granting summary judgment to the defendants on Count I and I'm dismissing Counts II and III for lack of subject matter jurisdiction.

The plaintiffs' motion for summary judgment is denied.

The minute order will read for the reasons stated in open [13] court, judgment is entered for the defendant on Count I. Counts II and III are dismissed, and plaintiffs' motion for summary judgment is denied.

Thank you, counsel.

MR. DIENNER: Thank you, Judge.

Judge, when you were reading your ruling on a couple of occasions you indicated the closing occurred in 1991 and in other cases 1990—

THE COURT: 1990 is the correct one. If I said 1991, I meant 1990.

MR. DIENNER: Thank you, Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 C 1798

Class Action

Judge Zagel

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN and DR. COSETTE Z. VILLANUEVA,
Plaintiffs,

vs.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation,
Defendant.

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF UNCONTESTED FACTS

CENTRAL COMMUNITY HOSPITAL, by its attorneys, JOHN A. DIENNER, III AND JAMES S. MONTANA, JR. responds to the plaintiffs' statement of uncontested facts as follows:

1. This action arises under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2104 ("WARN"). (Def. State. Uncontested Facts, par. 1)

Answer: Admitted.

2. This court has jurisdiction to hear and determine this action pursuant to 28 U.S.C., Sec. 1331 independent

jurisdiction of this court. (Def. State. Uncontested Facts, par. 2)

Answer: Admitted.

3. At all material times CENTRAL COMMUNITY HOSPITAL (hereinafter "Hospital") was an Illinois not-for-profit corporation located at 5701 S. Wood Street, Chicago, Illinois. (Def. State. Uncontested Facts, par. 3)

Answer: Admitted.

4. At all material times the Hospital was qualified as an organization which was exempt from income taxes under Internal Revenue Sections 501(c)(3). (Def. State. Uncontested Facts, par. 4)

Answer: Admitted.

5. Prior to the Hospital's closure, plaintiffs were employed by the Hospital in a variety of positions. (Def. State. Uncontested Facts, par. 5)

Answer: Admitted.

6. The CENTRAL COMMUNITY FOUNDATION (hereinafter the "Foundation") was incorporated on December 20, 1983. At all material times, Mr. Sherwin J. Stone was the President and a Trustee of the Foundation. The other Officers and Trustees of the Foundation from the time the Foundation was formed to and including the date the Hospital closed were Patrick A. DeMoon, Patrick

---

[1] For ease of reference, the affidavits of Myrna Jurcev, James J. Unland and Joseph D. Keenan, III, the exhibits attached thereto and various parts of pertinent deposition transcripts, all of which are incorporated by reference and made a part of plaintiffs' Statement of Uncontested Facts, are filed separately as an Appendix hereto and shall be cited herein as "A———".

The Foundation was created because the Hospital Board had considered other ventures and wanted an umbrella organization with funds to permit the Hospital Board to Branch out and open other hospitals. (P.S. DeMoon Dep., A392)

S. DeMoon and Dr. Algirdas Maciunas. (Appendix to Pl. State. of Uncontested Facts, A10, A12, A14 and A17) During that same period of time, Sherwin Stone, P.A. DeMoon, P.S. DeMoon and Dr. Algirdas Maciunas were also Officers and Trustees of the Hospital. (A10, A12, A14-15 and A17-A18) S. Stone ceased being President of the Hospital beginning in 1986. (A15) Further, at all material times Mr. Stone was general counsel for both the Foundation and the Hospital. (S. Stone Dep., A258 and A259) Last, Mr. Stone was one of the incorporators of the Foundation. (A258-260 and A39)

Answer: Admitted.

7. The Foundation was formed pursuant to a resolution of the Board of Trustees of the Hospital as a supporting foundation to the Hospital under the provisions of Section 501(c)(3) and 509(a)(3) of the Internal Revenue Code. (A9) Said resolution provided:

> RESOLVED, that the Hospital hereby approves the establishment of the Foundation as a charitable Foundation to be operated, supervised and controlled by or in connection with the Hospital for the purpose of conducting or supporting activities for the benefit of or to carry out the purposes of the Hospital and the Foundation shall in all respects qualify under the provisions of section 501(c)(3) and 509 (a)(3) of the Internal Revenue Code. (A9)

Answer: Central Community Hospital admits the first sentence of the Plaintiffs' Statement of Uncontested Facts and that the resolution, as recited, was passed. The defendant admits that P.S. DeMoon voted on favor of creating the Foundation for the reason set forth in the final sentence of Paragraph 7. The defendant neither admits nor denies that DeMoon's motivation was shared by the other trustees of the Hospital who voted to create the Foundation. Discovery in the case fails to disclose the motives of the other trustees.

8. Under paragraph 5 of the Rider to the Articles of Incorporation for the Foundation, the Foundation was

empowered "to receive gifts, devises, bequests and contributions in any form, and the use, apply, invest and reinvest the *principal* and/or income therefrom or *distribute the same*" exclusively for the benefit of the Hospital. (A40) (Emphasis added)

Answer: Denied. Paragraph 5 permitted the distribution of principal and/or income only if such distribution did not otherwise affect the exempt status of the Foundation under Section 501(a) and Section 501(c)(3) of the Internal Revenue Code and as a support foundation under section 509(a)(3) of the Internal Revenue Code (Def. Exh. A, unnumbered paragraph 4 of Rider to Articles of Incorporation). Further, the Foundation specifically advised the Internal Revenue Service in its Exemption Application that it would not distribute principal to the supported organization if exempt status was conferred upon it. (Defendant's Exh. A, p. 2, par. 3; p. 3, par. 7b).

9. On June 7, 1984 the Foundation filed an Application for Recognition of Exemption under Section 501 (c)(3) of the Internal Revenue Code ("Application for Exemption"). (A19) Attached as Exhibit "III" to the Application for Exemption were the Articles of Incorporation and Bylaws for the Foundation, which specifically permitted distribution of principal to support of the Hospital. (A35-41 and A142-A150)

Answer: Denied. Paragraph 5 permitted the distribution of principal and/or income only if such distribution did not otherwise affect the exempt status of the Foundation under Section 501(a) and section 501(c)(3) of the Internal Revenue Code and as a support foundation under Section 509(a)(3) of the Internal Revenue Code (Def. Exh. A, unnumbered paragraph 4 of Rider to Articles of Incorporation). Further, the Foundation specifically advised the Internal Revenue Service in its Exemption Application that it would not distribute principal to the supported organization if exempt status was conferred upon it. (Defendant's Exh. A, p. 2, par. 3; p. 3, par. 7b).

10. In response to question 1 under part III of the Application for Exemption, to wit, "What are or will be the organization's sources of financial support?", the Foundation responded:

> "Central Community Hospital, a 501(c)(3) organization will provide the initial funds for this organization. When the applicant is fully operational, its funds will be used to give financial support to the 501(c)(3) organization." (A19)

Answer: Admitted, however, in other portions of the Exemption Application, the Foundation specifically advised the Internal Revenue Service that in the event exempt status was conferred upon it, the Foundation would only distribute income to the supported organization. In response to question 7(b) Part III of the Exemption Application to wit, "to what extent have you used, or do you plan to use contributions as an endowment fund, i.e. hold contributions to produce income for the support of your exempt activities?", the Foundation responded:

> "The Foundation plans to utilize all assets received by it from the supported organization [Central Community Hospital] *as an endowment fund to produce income* for the support of the Foundation's exempt activities and to give financial support to the 501 (c)(3) organization." (Defendant's Exh. A, p. 3, Emphasis added).

Furthermore in response to question 3 of Part III of the application for exemption, to wit, "give a narrative description of the activities presently carried on by the organization and those that will be carried on," the Foundation responded:

> ". . . finally, the Foundation will be responsible for the prudent investment and management of the funds entrusted to it and the utilization of *its earnings* to give support to the 501(c)(3) organization." (Defendant's Exh. A, p. 2, Emphasis added).

11. In response to question 4 of Part VII of the Application for Exemption, to wit, "To what extent does the supported organization have a significant voice in your investment policies, the making and timing of grants, and in otherwise *directing the use of your* income or *assets*?" (Emphasis added), the Foundation responded:

> "The supported organization has no direct voice or control over the Foundation's investment policies, grants or uses of income, except through its right to appoint the trustees of the Foundation annually." (A25)

Answer: Admitted.

12. On December 17, 1984 the Internal Revenue Service issued its exemption letter ruling that the Foundation would be exempt from income taxes. (A42)

Answer: The defendant admits that the Internal Revenue Service ruled that the Foundation would be exempt from taxes so long as its activities corresponded with those set forth in the Exemption Application.

13. In the December 17, 1985 letter the Internal Revenue Service informed the Foundation that if it had any questions about this exemption ruling, the Foundation should contact Internal Revenue Service employee James Filmore (sic) at telephone number (202) 566-3883. (A43)

Answer: Admitted. The letter also specifically stated that exemption was being granted "based upon information supplied and assuming your operations will be as stated in your application." (Defendant's Exh. B)

14. At the December 20, 1984 Hospital Board of Trustee's meeting, the Trustees of the Hospital unanimously approved the following motion under which the entire investment portfolio of the Hospital was transferred to the Foundation:

> "Thereupon, Mr. Patrick A. DeMoon moved that this corporation transfer to Central Community Foundation all of the assets including accrued income thereon comprising the investment portfolio of the corporation held by Continental Bank of Chicago in Account No. 11-00292-02-0 to be used by the Foundation in accordance with its philanthropic and charitable purposes and further move that the officers of the corporation be authorized and directed to execute such documents as may be necessary or appropriate in order to effectuate the transfer hereinabove referred to." (A11)

The Hospital transferred assets to the Foundation valued at $19,061,886.00. (A91)

Answer: The defendant admits that the quoted language is found in the minutes of the December 20, 1984 meeting of the Hospital Board of Trustees but denies that the minutes represent or purport to represent a verbatim transcription of the motion made by Mr. Patrick A. DeMoon (See Defendant's Exh. C, p. 3). The defendant further admits that it transferred $19,061,886.00 (at book value) in assets to the Foundation.

15. The books and the financial records of the Foundation were maintained at the Hospital under the care and supervision of the Hospital Comptroller, Mr. Harold Reisler. (H. Reisler Dep., 328)

Answer: The defendant admits only that the Foundation's general ledger was maintained by Reisler at the Hospital (Reisler's Dep., p. 23). The facts set forth in the second and third sentences are admitted.

16. In December, 1984 and February, 1985 the Foundation provided monies in the amounts of $70,000.00 and $115,000.00, respectively, for the purchase of two parcels of property to be used as professional office buildings by the Hospital's physicians. (Def. State. Uncontested Facts, Par. 10)

Answer: Admitted.

17. Between November 4, 1985 and January 22, 1990, the Foundation made the following unrestricted subventions to the Hospital:

November 4, 1985	—	$ 250,000.00
February 24, 1986	—	$ 100,000.00
December 3, 1986	—	$1,000,000.00
January 27, 1987	—	$1,000,000.00
June 27, 1987	—	$1,000,000.00
November 26, 1987	—	$1,000,000.00
January 15, 1988	—	$ 600,000.00
April 15, 1988	—	$1,000,000.00
August 11, 1988	—	$1,000,000.00
November 8, 1988	—	$1,000,000.00
March 2, 1989	—	$1,000,000.00
June 29, 1989	—	$1,000,000.00
October 18, 1989	—	$1,000,000.00
January 22, 1990	—	$1,000,000.00

(Def. State. Uncontested Facts, Par. 11) The above subventions were often made without first obtaining the prior approval of all of the Trustees of the Foundation. (A. Maciunas Dep., A348-A349)

Answer: The defendant admits the facts set forth in the first sentence. The defendant denies that the subventions were "often" made without first obtaining the prior approval of the trustees. Plaintiffs' citation does not support the assertions that such subventions were "often" made. (See Maciunas Dep., A348-A350).

18. The financial condition of the Hospital had been steadily deteriorating for the years prior to its closure. (P.S. DeMoon Dep., A69)

Answer: The defendant admits the facts recited in Paragraph 18 but denies that the deposition reference is accurate.

19. During this period, P.S. DeMoon testified that the Hospital relied on the subventions from the Foundation to support its continued day-to-day operations. (P.S. DeMoon Dep., A68)

Answer: The defendant admits that the Hospital used the subventions to cover some of its operating losses. The defendant denies that DeMoon testified to any facts during the period in question (DeMoon Dep., p. A-68).

20. Notwithstanding the fact that the Hospital was losing money for the years prior to its closure, the Hospital loaned $1,857,212.00 to Franklin Boulevard Community Hospital during that period. (A54, A79 and A91) Mr. Patrick A. DeMoon and Mr. Patrick S. DeMoon were Officers and Trustees of Franklin Boulevard Community Hospital. (P.S. DeMoon dep., A299) Mr. Harold Reisler testified in his deposition that the loans to Franklin Boulevard Community Hospital were not consistent with the purposes of Central Community Hospital. (H. Reisler Dep., A96)

Answer: The defendant neither admits nor denies the allegations contained in Paragraph 20 as this court has previously ruled that loans to Franklin Boulevard Community Hospital are irrelevant to all issues in this case. (Tr. 9/26/90, pp. 13-14)

21. According to an order entered *In Re Westside Community Hospital, Inc.*, 89 B 8632, U.S. Bankruptcy Court for the Northern District of Illinois, the Central Community Hospital, despite being the only secured creditor of Franklin Boulevard Community Hospital, received only $100,000.00 of the proceeds of the sale of Franklin Boulevard Community Hospital to Westside Hospital, while Mr. Patrick A. DeMoon was paid in full on his unsecured debt in the amount of $195,613.00. (A110-A111) There was no record in the Hospital's Trustee Minutes that the Board was asked to approve this distribution of the proceeds of the sale of the Frank-

lin Boulevard Community Hospital. (E. Burke Dep., A376-A377)

Answer: The defendant neither admits nor denies the allegations contained in Paragraph 20 as this court has previously ruled that loans to Franklin Boulevard Community Hospital are irrelevant to all issues in this case. (Tr. 9/26/90, pp. 13-14)

22. The Comptroller of the Hospital, Mr. Harold Reisler, who also performed all of the internal accounting for the Foundation, was aware that the Foundation had invaded principal at the time of the Foundation's October 18, 1989 subvention of $1,000,000.00. (H. Reisler Dep., A326 and A331-A332)

Answer: The defendant admits only that Harold Reisler maintained the general ledger for the Foundation and denies that he was aware that the Foundation had invaded principal at the time of the October 18, 1989 subvention. Reisler testified that he knew before the Hospitals' closure that principal had been invaded (Reisler Dep., A331). He *guessed* (A332) that he could have known a year before closure. However, that would have been in February, 1989 and principal was not invaded until the October, 1989 subvention. Hence, his "guess" was demonstrably inaccurate.

23. P.S. DeMoon and Sherwin Stone, as Officers of both the Foundation and the Hospital were privy to the audited financial statement prepared by Laventhol & Horwath for both the Foundation and the Hospital. (S. Stone Dep., 293; P.S. DeMoon Dep., A319; A158, A182 and A205)

Answer: The defendant admits that P.S. DeMoon received copies of the audited financial statements prepared by Laventhol & Horwath for both the Foundation and the Hospital and further admits that Sherwin Stone received copies of the audited financial statement for the Foundation and from time to time the audited financial report for the Hospital. (Stone Dep., A293)

24. Sometime prior to February 26, 1990, Mr. P.S. DeMoon told Harold Reisler in the presence of plaintiff Myrna Jurcev that the Hospital was not going to be paid anything by Franklin Boulevard Community Hospital and that the Hospital would have to close. (M. Jurcev, Aff., A5)

Answer: Denied (Defendant's Exh. O, DeMoon Suppl. Aff., par. 5).

25. The Board of Trustees of the Hospital held a special meeting on February 19, 1990 at which Sherwin Stone advised the Trustees that the Foundation may be precluded from making any further distributions to the Hospital in excess of income, that the legal and tax consequences would be researched and that he would report back to them as soon as the research was completed. (Def. State. Uncontested Facts, Par. 16) However, long before this February 1990 meeting, Sherwin Stone has informed fellow Foundation Trustee and Officer Dr. Algirdas Maciunas that under the Foundation's Articles, principal could not be used to support the Hospital. (A. Maciunas Dep., A350-A351)

Answer: The defendant admits the allegations contained in the first sentence. The defendant denies the second sentence and affirmatively asserts that Stone informed Maciunas at the time the Foundation received its tax exemption that the Foundation could subvent only income. (Defendant's Exh. C, p. 3)

26. On February 20, 1990, Sherwin stone held a meeting with two attorneys in his law firm of Altheimer and Gray, Erwin Mayer and Mary Taylor, at which the issue of the Foundation's use of principal to support the Hospital was discussed. (S. Stone Dep., A283) At the meeting Sherwin Stone directed Erwin Mayer to prepare a memorandum, the purpose of which was to summarize their discussions at the meeting and to confirm that the issues discussed in the meeting were real issues. (E.

Mayer Dep., A16) The meeting lasted an hour. (E. Mayer Dep., A13)

Answer: Defendant admits that Stone met with Mayer and Taylor and discussed the issue of the Foundation's use of principal. The defendant denies that the Mayer memo simply confirmed the discussions at the meeting. The defendant affirmatively asserts that the memo was prepared after Mayer conducted research into the issue including a review of the source documents, the Internal Revenue Code, Treasury regulations, other tax treatises and had discussed his findings with Mary Taylor (E. Mayer Dep., p. 17).

27. Erwin Mayer had just recently received his law degree from Loyola University in 1987. (E. Mayer Dep., A231-1) At the time Erwin Mayer was directed to prepare the memorandum, he had taken no courses dealing with not-for-profit foundations. (E. Mayer Dep., 231) Further, Erwin Mayer had never done any prior research on the issue of the propriety of the 509(a)(3) foundation's use of principal to support a 501(c)(3) organization. (E. Mayer dep., A234)

Answer: The defendant denies plaintiffs' inaccurate characterization in the first sentence that Erwin Mayer had just recently received his law degree from Loyola University and states the fact to be that he had received his law degree almost three years prior to the time that he prepared the memorandum (Mayer Dep., p. 5). The defendant admits the facts contained in the second and third sentence of paragraphs 27 but denies that plaintiffs' deposition references are accurate and denies that plaintiffs' paragraph 27 fully and accurately describes Mayer's credentials or experience or properly reflects the participation and the experience of Mary P. Taylor and Sherwin J. Stone.

28. Erwin Mayer did not know that the conclusions reached in his memorandum would be transmitted to the

Foundation or that the Foundation would be acting on his findings. (E. Mayer Dep., A237-238)

Answer: Admitted.

29. Mr. Mayer spent somewhere between a total of four and seven hours inclusive researching the issue and drafting his memorandum. (E. Mayer Dep., A244-A245) His memorandum was completed either late in the day on February 20, 1990 or early in the day on February 21, 1990. (E. Mayer Dep., A244)

Answer: The first sentence of paragraph is denied. Mr. Mayer's spent somewhere between a total of four and five hours researching the issues and approximately two hours drafting his memorandum (E. Mayer Dep., A245-246). The defendant further admits the memorandum was completed either late in the day on February 19 or early in the day on February 20 as is evidenced by the errata sheets completed by Mayer and attached to his deposition (E. Mayer Dep., errata sheet). The defendant denies that the statement is complete as it does not reflect the experience or participation of Mary P. Taylor and Sherwin J. Stone.

30. In his deposition Mr. Mayer testified that his research on the issue of whether a Foundation could utilize principal to support a 501(c)(3) organization uncovered no specific guidance. (E. Mayer dep., A239-A240) In all of his research, nothing specifically precluded the use of principal and nothing specifically permitted it. (E. Mayer Dep., A241-A243 and A249) Mr. Mayer recognized that the Articles of Incorporation of the Foundation permitted the Foundation to use principal to support the Hospital, but found that since his research did not uncover any specific provisions permitting a 509(a)(3) foundation to use principal to support a 503(c)(3) organization, the Foundation was jeopardizing its tax exempt status by continuing to use principal to support the Hospital. (E. Mayer Dep., A246-A248)

Answer: The defendant denies the first sentence of paragraph 30 and states that Mr. Mayer testified that there were cases and law review articles that dealt in a general way with loss of tax exempt status by a 509(a)(3) support organization (E. Mayer Dep., A239). Defendant admits the second sentence of paragraph 30, but further avers that the Internal Revenue Code regulations talked about the distribution of earnings only and lead him to the conclusion that there may be a problem with respect to continued and repeated invasions of principal. The defendant denies the third sentence in paragraph 30 and states affirmatively that Mayer concluded that the Foundation's continued distributions of principal might be proscribed by the Exemption Application, the subsequent letter ruling from the Internal Revenue Service and the language of paragraph 5 of the Rider to the Articles of Incorporation (E. Mayer Dep., pp. 43-46).

31. Likewise, Mr. Stone was unable to identify during his deposition any provision of the Internal Revenue Code upon which he relied in support of underlying premises that supported his legal conclusion that the Foundation could not use principal to support the Hospital. (S. Stone Dep., A261-A266 and A267-A277)

Answer: Denied. Mr. Stone testified that principal could not be used because the Foundation foreswore its use in the Exemption Application (Stone Dep., pp. 50, 51, 58-61).

32. Mr. Mayer was further concerned that the Foundation was not fulfilling its charitable purposes of supporting the Hospital if the Hospital was not using the subvented funds appropriately. (E. Mayer Dep., A250-A251) The only facts of which Mr. Mayer was aware on this issue was the fact that the Hospital had been losing money for a period of time. (E. Mayer Dep., A251) Mr. Mayer testified that for the Trustees of the Foundation to repeatedly invade principal to support an organization which had been losing money for a number of

years, may not fulfill the charitable purposes which the Hospital and/or the Foundation was intended to fulfill. (E. Mayer Dep., A250)

Answer: The defendant denies the first and third sentences. Defendant admits the facts contained in the second sentence in Paragraph 32. The defendant affirmatively avers that Mayer was also concerned with the possible breach of fiduciary duties by the Trustees if they continued to distribute principal to the Hospital in violation of the terms and conditions contained in the Exemption Application (E. Mayer Dep., pp. 29-30)

33. Erwin Mayer admitted that it was unlikely that the Foundation would lose its tax exempt status by using principal to support the Hospital. (E. Mayer Dep., A252-A253; A229-3) Mr. Mayer stated in his memorandum that the conclusions reached in his memorandum "should not be considered definitive legal or tax advice for guidance with respect to the concerns discussed herein." (A229-2) Mary Taylor and Sherwin Stone concurred in the conclusions reached by Mr. Mayer in his memorandum. (E. Mayer Dep., A234)

Answer: The defendant asserts that Erwin Mayer plainly stated in his memorandum that it was unlikely that the Foundation would lose its tax exempt status but stated that it was "possible" (Defendant's Exh. E). The defendant denies that the first deposition referenced is accurate. The defendant admits the facts contained in the second and third sentences of Paragraph 33 but states that the deposition reference is erroneous.

34. Mr. Mayer's February 20, 1990 memorandum was never distributed to the Trustees of the Foundation or the Hospital. (S. Stone Dep., A107)

Answer: Defendant admits paragraph 34 but affirmatively avers that the contents of the memorandum were specifically disclosed to the Trustees of the Foundation and the Hospital by Mr. Stone and denies the implication

that the Trustees were not aware of the contents thereof (Defendant's Exh. F, p. 1).

35. The Foundation attorneys never contacted the Internal Revenue Service to request any ruling or direction from the Internal Revenue Service on the Foundation's continued use of principal to support the Hospital. (S. Stone Dep., A287-288)

Answer: The defendant admits the facts set forth in Paragraph 35 as there was no time within which to receive a ruling but denies the accuracy of the deposition reference.

36. Sherwin Stone testified in his deposition that he telephoned Mr. Thomas Trabon of Laventhol & Horwath, who was located in the Laventhol & Horwath office in Philadelphia, Pennsylvania, and advised Mr. Trabon of his concerns involving the Hospital's continued use of principal to support the Hospital. (S. Stone Dep., A278) Mr. Stone testified in his deposition that Mr. Trabon had no opinion on the issue after Mr. Stone recited certain facts during this telephone conversation with Mr. Trabon. (S. Stone Dep., A278) Mr. Stone testified in his deposition that he did not tell Mr. Trabon that the Foundation Articles of Incorporation were attached to the Application for exemption as an exhibit or that all of the assets of the Foundation were provided by the Hospital. (S. Stone Dep., A279 and A281) Further, Mr. Stone testified that Mr. Trabon was not furnished with any documents relating in any way to this issue. (S. Stone Dep., A279)

Answer: The defendants admit the facts contained in the first sentence of Paragraph 36. With regard to the second sentence, the defendant admits that Mr. Trabon had no opinion on the issue during their *first* telephone call but affirmatively states that Trabon had and expressed his opinion in a *second* telephone call which was similar to the opinion Stone had received from the tax attorneys in his office (Stone Dep., p. 73). The defendant admits

the first part of the third sentence but denies that Stone failed to tell Trabon that all of the assets came from the Hospital. Stone testified that he could not recall if he told Trabon that the assets came from the Hospital (Stone Dep., A281). The defendant admits the facts contained in the fourth sentence of Paragraph 36.

37. After the preparation of Mr. Mayer's February 20, 1990 memorandum, neither Mr. Mayer not Mr. Stone engaged in any additional research on the issue of the Foundation's use of principal to support the Hospital. (E. Mayer Dep., A254; S. Stone Dep., A294)

Answer: Admitted.

38. Mr. Harold Reisler, a certified public accountant and the in house accountant of both the Hospital and the Foundation was not aware of any law under which the use of principal to support the Hospital by the Foundation would threaten the Foundation's tax exempt status. (H. Reisler Dep., A333)

Answer: The defendant admits that Reisler was not aware that the Foundation could not subvent principal. The defendant avers that he was not aware of it as he was not privy to the Exemption Application or exemption letter (Reisler Dep., pp. 26-27).

39. On February 23, 1990, Mr. P.S. DeMoon, Administrator of the Hospital, prepared an initial draft of the Hospital's Notice of Closure to be delivered to the employees. (S. Stone Dep., A295-A296) Mr. DeMoon's draft was rewritten by Sherwin Stone with the WARN Act in mind, the final form of which is attached hereto as Ex. "S". (S. Stone Dep., A295-A296)

Answer: The defendant admits the facts contained in the first sentence of Paragraph 39. The defendant affirmatively states that Sherwin Stone and Steve Peltin rewrote the draft to ensure compliance with the WARN Act. (Plaintiff's App. p. 229-1)

40. On February 26, 1990, the Board of Trustees of the Foundation, based solely on the advice of Sherwin Stone, voted to cease making subventions to the Hospital until the Hospital repaid monies to offset the invasions of principal or the Foundation received a ruling from the Internal Revenue Service permitting the payment of principal to the Hospital. (Def. State. Uncontested Facts, Par. 19; S. Stone Dep., A290-291; P.S. DeMoon Dep., A304; and A. Maciunas Dep., A352) The Foundation never sought such a ruling from the Internal Revenue Service. (P.S. DeMoon Dep., A307)

Answer: The defendant admits that after Sherwin Stone gave his presentation on February 26, 1990, the Board of Trustees voted to cease making subventions to the Hospital until the Hospital repaid the invasion of principal or the Foundation earned sufficient monies to offset the invasions of principal or the Foundation received a ruling from the Internal Revenue Service permitting the payment of principal to the Hospital (Defendant's Exh. F). The defendant denies that the Trustees relied solely upon the advice of Sherwin Stone in making their decision to cease making subventions, since Stone also advised the Trustees of the advice received from Thomas Trabon of Laventhol & Horwath (Stone Aff., par. 15). It is admitted that the Foundation never sought a ruling from the Internal Revenue Service as there was insufficient time within which to do so.

41. A meeting of the Board of Trustees of the Hospital was held on February 26, 1990 immediately after the meeting of the Board of Trustees of the Foundation. (Def. State. Uncontested Facts, Par. 20)

Answer: Admitted.

42. At the Board of Trustees Meeting of the Hospital, Mr. Stone announced that the Foundation would not make any further subventions to the Hospital. (P.S. DeMoon Dep., A306) Mr. P.S. DeMoon then told the Hospital

Trustees that the Hospital had cash on hand plus anticipated cash receipts to keep the Hospital open for approximately two weeks. (P.S. DeMoon Dep., A306) The Hospital Trustees thereupon voted to close the Hospital effective March 14, 1990. (Def. Stat. Uncontested Facts, Par. 21)

Answer: At the Board of Trustees meeting of the Hospital, Mr. Stone announced that the Foundation would not make any further subventions to the Hospital until the Hospital repaid the invasions of principal or the Foundation earned sufficient income to offset the amount of the distributions from principal, whichever event first occurs (Defendant's Exh. F). The defendant admits the facts contained in the second and third sentences of paragraph 42 but states that such facts are incomplete as they do not reflect the Trustees' discussion of the Hospital's financial situation and the lack of viable options other than the closing of the Hospital (Def.'s Exh. F).

43. Mr. DeMoon's statement at the Hospital's Trustees meeting on February 26, 1990 that the Hospital had sufficient cash flow to stay open approximately two weeks was based on a cash flow projection prepared by H. Reisler dated February 26, 1990. (P.S. DeMoon Dep., A61; A114)

Answer: Admitted.

44. The payables on February 26, 1990 cash flow projection included all of the payables of the Hospital at that time, all of which were not immediately due or due in fourteen (14) days. (A114; A115; H. Reisler Dep., A334-A335). The Hospital was current on all of its obligations at that time. (A335) Half of the payables could have been deferred without threatening the continued operations of the Hospital. (H. Reisler Dep., A335-A335-1) Mr. Reisler admitted that all of the payables listed in his cash flow projection would have been paid in the future if deferred given the fact that the Hospital had

$3,253,151.00 in collectable accounts receivable. (H. Reisler Dep., A336-9337)

Answer: The defendant admits the facts contained in the first two sentences of Paragraph 44. The defendant denies the facts contained in the third sentence and states that Harold Reisler *guessed* that half of the payables might be deferred without threatening the continued operations but testified that he did not know for sure (Reisler Dep., p. 57). The defendant admits that Mr. Reisler stated that all payables listed in the cash flow projection could be paid in the future *assuming* the collection of all receivables. The defendant denies the implication that Mr. Reisler expressed an opinion on how much of those receivables would be collected.

45. On or about February 26, 1990, a group of doctors at the Hospital organized by Dr. Carmeleta Carriage made an oral offer to purchase the Hospital for $1,000,000.00 (P.S. DeMoon Dep., A316)

Answer: The defendant admits that a group of doctors at the Hospital expressed a desire to purchase the Hospital for $1,000,000.00 cash but deny that the doctors were able to follow through on their desire. The defendant affirmatively avers that the doctors formally withdrew all offers to purchase the Hospital on March 14, 1990, the date upon which the Hospital closed, because of their inability to secure the necessary financing to consummate a purchase (Defendant's Exh. Q, Stone Suppl. Aff.).

46. From February 26, 1990 through the date the Hospital closed on March 14, 1990 there were rumors in the Hospital that the Hospital would not close because the Hospital was going to be sold. (H. Reisler Dep., A344-A345; P.S. DeMoon Dep., 320; M. Jurcev Dep., A402-A405; F. Moore Dep., A396; R. Riordan Dep., A392-A393; and S. Miller Dep., A379-A381) P.S. DeMoon testified in his deposition that several employees of the Hospital asked him whether the Hospital would be sold to

which he responded, "There is always hope." (P.S. DeMoon Dep., 322) Mr. Reisler testified that he wasn't certain that the Hospital was going to close because the doctors' group was interested in purchasing the Hospital. (H. Reisler Dep., A344-A345) Further, Mr. Reisler testified that he heard that on March 14, 1990, Mr. P.A. DeMoon, Executive Director of the Hospital, had announced in the cafeteria that the Hospital was going to be sold and that it would not be closed. (H. Reisler Dep., A343; Mr. Jurcev Aff. A4)

Answer: The defendant admits the facts contained in the first three sentences of Paragraph 46 but denies the accurracy of some of the deposition references. The defendant affirmatively avers that Mr. Reisler testified that despite the rumors of a possible sale, he was "pretty sure" that the Hospital would close (Reisler Dep., p. 112). The defendant objects to the repetition of hearsay reported in the depositions of Reisler and Jurcev which are contained in the final sentence of Paragraph 46.

47. On or about March 8, 1990, copy of the letter dated February 26, 1990, (A229-1) was included in the envelope with each employee's paycheck and delivered to each employee. (Def. state. Uncontested Facts, par. 23) In the February 26, 1990 letter, the Hospital advised each employee that the Hospital would close on March 14, 1990. (A229-1)

Answer: Admitted.

48. Beginning on or about March 9, 1990, a group of doctors at the Hospital, through their attorneys Holleb and Coff and their business consultant The Health Capital Group, Inc., made three (3) written attempts to purchase the Hospital. (Affidavit of Mark D. Olson, a copy of which is filed separately as a part of Pl. Amendment to its Statement of Uncontested Facts, P.S. DeMoon Dep., A312-A315) The attempt to purchase the Hospital by the group of doctors was never presented to the Board of

Trustees of the Hospital for their consideration. (P.S. DeMoon Dep., A315 and F. Howard Dep., A368).

Answer: Defendant denies the allegations contained in paragraph 48. Whether or not a group of doctors "attempted" to purchase the Hospital after the Hospital notified its employees February 26, 1990 that it was closing on March 14, 1990 is irrelevant to plaintiffs' WARN Act claim or defendant's defense thereto that based upon unforeseeable business circumstances, the Hospital was excused from its ordinary WARN Act obligation to supply 60 days' notice before closing. Moreover, plaintiffs' complaint does not allege that the Hospital's failure to sell the Hospital to a group of doctors was a violation of the WARN Act. (Pl. Complaint). Therefore, the "facts" contained in paragraph 48 are immaterial to the adjudication of defendant's motion for summary judgment. Notwithstanding the irrelevant and immaterial nature of such "facts", defendant states that the Hospital never received a written offer to purchase executed by the doctors group or an earnest money deposit. The proposals contained in the three communications received from the doctors group did not comply with the terms and conditions for sale specified by the Hospital (Stone Suppl. Aff.). Prior to the closure of the Hospital on March 14, 1990, the doctors group withdrew its so-called "offer" to purchase the Hospital (id). The reason for the termination of the negotiations given to the attorney for the Hospital was that the doctors were unable to arrange for working capital to operate the Hospital. Accordingly, there was no "offer" that could be presented to the Trustees of the Hospital (id).

49. The Hospital closed on March 14, 1990 and all employees were terminated effective that date except for a limited number of security, custodial and administrative employees who were retained to wind down the affairs of the Hospital. (Def. State. Uncontested facts, Par. 25)

Answer: Admitted.

50. As of February 28, 1990 the balance sheet of the Hospital reflected $3,253,151.00 in collectable accounts receivables and property and equipment having a book value of $5,091,645.00 (A115) There was no mortgage or lien on any of the property, plant and equipment of the Hospital as of February 28, 1990. (Ex. A115) No efforts were undertaken by the Hospital to borrow money to stay open. (P.S. DeMoon Dep., A308-A309)

Answer: Defendant denies that the balance sheet of the Hospital as of February 28, 1990 reflected $3,253,151 in "collectable" accounts receivable. (Plaintiff's App. A115) Defendant admits the second sentence of Paragraph 50. Defendant denies the allegations contained in the third sentence of Paragraph 50 and states that plaintiffs have mischaracterized the witness's deposition testimony. Defendant further avers that at the February 26, 1990 Board meeting obtaining a bank loan was discussed (Def.'s Exh. F).

51. No financial documentation such as audited or unaudited financial statements of the Hospital or Mr. Reisler's February 26, 1990 cash flow projection were furnished to the Trustees of the Hospital at the February 26, 1990 Board of Trustees meeting. (S. Stone dep., A123)

Answer: The defendant admits the facts contained in Paragraph 51 but alleges that the contents of the cash flow projection was discussed with the Trustees at the Board meeting on February 26, 1990 (Def.'s Exh. F). Defendant denies the accuracy of the deposition reference.

52. Mr. Stone testified that all of the Trustees of the Hospital were not provided with the annual audited financial statements of the Hospital. (S. Stone Dep., A293) Hospital Trustees Edward Burke, Francis Howard, and Dr. Simon Sprtel testified at their depositions that they were not furnished with audited financial statements of the Hospital. (A372-A374; A365-A366; A361) Many of

the Trustees of the the Hospital had little knowledge of the Foundation and/or the Franklin Boulevard Community Hospital loans. (E. Burke Dep., A375; A. Maciunas Dep., A354; F. Howard dep., A368; S. Sprtel Dep., A357 and A363)

Answer: The defendants admit the facts contained in the first two sentences of Paragraph 52. The defendant objects to and neither admits nor denies the purported facts set forth in the final sentence of Paragraph 52 as such facts were determined by this court to be irrelevant to all matters in controversy. (Tr. 9/26/90. pp 13-14)

53. The Joint Commission on Hospital Accreditation ("JCHA") required the Hospital to maintain an Administrative Policy Book in each department in the Hospital setting forth the terms and conditions of employment, including but not limited to sick pay policy. (M. Jurcev Dep., A419-A420) The official sick leave policy of the Hospital was that contained in the policy manual maintained by the Hospital in each of its department. (M. Jurcev Dep., A419-A420; M. Jurcev Aff., A3)

Answer: The defendant denies the first sentence of Paragraph 53. The Joint Committee on Hospital Accreditation ("JCHA") has never required that any hospital subject to accreditation by the JCHA maintain an Administrative Policy Book in each department in the Hospital setting forth the terms employment, including but not limited to a sick pay policy. (Exh. O, P.S. DeMoon, Supp. Aff. par. 3). In any event, such a requirement by the JCHA, even if it existed, would be irrelevant in determining whether a contract to pay accumulated sick leave was formed, as it does not reveal either the clarity of a particular statement or its actual level of dissemination. The defendant denies the second sentence. The "official" sick leave policy was that actually disseminated to employees. In January, 1987, that "official" sick leave policy consisted of a policy statement as further explained by

memos sent to the department heads and to each employee in the pay envelope.

54. The original sick pay policy at the Hospital was contained in a blue handbook, which was given to each employee at the time of their hiring. (P.S. DeMoon Dep., A322-1) Under the original sick pay policy in the blue handbook, the employees were not entitled to accumulated sick pay upon termination of employment. (A124)

Answer: The defendant admits the facts contained in the first sentence of Paragraph 54 but denies the accuracy of the deposition reference. The defendant admits the facts contained in the second sentence of Paragraph 54.

55. Revisions to the sick pay policy in the handbook occurred in January of 1979. (M. Jurcev Aff., A5; A125)

Answer: The defendant admits that revisions to the sick pay policy were made in January of 1979. The defendant affirmatively avers that, for a period of time, revisions were made in the handbooks by stapling undated versions of policies over outdated versions of policies. In that manner all new employees had a current statement of the sick leave policy (DeMoon Dep., p. 106).

56. The sick pay policy at the Hospital was revised again in March of 1985 as evidenced by Ex. "M" hereto. (A126) Ex. "M" was placed in the Administrative Policy Manual maintained by the Hospital in each of its departments. (P.S. DeMoon Dep., A323)

Answer: The defendants admits the facts contained in the first sentence of Paragraph 56. The defendants further admit that P.S. DeMoon testified that "to the best of his knowledge" Ex. M was placed in the policy manual maintained in each department of the Hospital.

57. The sick pay policy at the Hospital was again revised in January of 1987 as evidenced by Ex. "N" hereto, which was placed in the Administrative Policy

Manual maintained by each of its departments. (M. Jurcev Dep., A419-A420)

Answer: Admitted.

58. By 1987 the blue handbook (Exh. "K" hereto) was considered obsolete on account of the revisions described in paragraphs 54-56 above.

Answer: Denied. Plaintiffs do not identify who considered the blue handbook obsolete. The subjective view of unidentified parties is not a fact.

59. The January 1987 administrative policy on sick pay (Ex. "N" hereto) eliminated the prior sick pay policy set forth in the March 1985 Administrative policy on sick pay, to wit, that an employee is not eligible for accumulated sick leave benefits upon termination of employment. (Compare A127 with A126)

Answer: Denied. Plaintiff do not state a fact, they offer an interpretation. The text of the January 1987 administrative policy on sick leave does not reiterate the Hospital's longstanding policy that employees were not eligible to receive payment for accumulated sick leave upon termination of employment; however, the mere absence of that iteration does not mean that the January 1989 administrative policy "eliminated" the prior policy or created a right to payment of unused sick days upon separation from employment. Note also contemporaneous documentation (the January 15, 1987 notice) distributed to all employees in their paychecks, which clearly states that "as of January 1, 1987, accumulated sick days will no longer be paid." (Defendant's Exh. K)

60. Myrna Jurcev expected to be paid for accumulated sick leave at the time of her termination of employment. (M. Jurcev Aff., A4; M. Jurcev Dep., A408-A409) At the time Rosemary Riordan left full time employment of the Hospital in 1987, she asked Harold Reisler for payment of accumulated sick pay, but Mr. Reisler replied she

was not eligible for accumulated sick pay upon her termination from employment. (R. Riordan Dep., A391)

Answer: Defendant admits that Jurcev and Riordan requested payment of accumulated sick pay, and were denied such pay in accordance with Hospital policy. Defendant denies the first sentence of Paragraph 60. Plaintiff Jurcev's subjective expectation regarding payment of accumulated sick leave is irrelevant. For a contract of payment to exist, this expectation must be reasonable, and Jurcev's expectation of payment has no basis in fact.

Respectfully submitted,

/s/ [Illegible]
One of the attorneys
for the Defendant

JOHN A. DIENNER, III
Law Offices of James S. Montana, Jr.
100 West Monroe Street
Eighteenth Floor
Chicago, Illinois 60603
(312) 346-9538

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 90 C 1798

Class Action

Judge Zagel

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN and DR. COSETTE Z. VILLANUEVA,
Plaintiffs,

vs

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation
Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF UNCONTESTED FACTS

Plaintiffs, MYRNA JURCEV, et al., by their attorneys, JOSEPH D. KEENAN, III and McDERMOTT, WILL & EMERY, set forth the following response to Defendant's Statement of Uncontested Facts pursuant to Local Rule 12(n):

1. This action arises under the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. 2104 (Complaint par. 1).

ANSWER: Admitted.

2. This Court has jurisdiction to hear and determine this action pursuant to 28 U.S.C. 1331 and the pendent jurisdiction of this Court.

ANSWER: Admitted.

3. At all material times the Central Community Hospital (hereinafter "Hospital") was an Illinois not-for-profit corporation located at 5701 S. Wood Street in Chicago, Illinois (Complaint par. 11; DeMoon affidavit, par. 2).

ANSWER: Admitted.

4. At all material times the Hospital was qualified as an organization which was exempt from income taxes under Internal Revenue Code Sec. 501(c)(3) (26 U.S.C. 501(c)(3) (Complaint par. 11).

ANSWER: Admitted.

5. Prior to its closure, the plaintiffs were employed by the Hospital in a variety of positions (Complaint pars. 4-10).

ANSWER: Admitted.

6. The Central Community Foundation (hereinafter "the Foundation") was incorporated on December 20, 1983. At all material times, Sherwin J. Stone was the President of the Foundation. The trustees were appointed by the Hospitals' Board of Trustees but subsequent to their appointment they were independent of the Hospital and had no duty to report to the Hospital (see Stone affidavit par. 4).

ANSWER: Plaintiffs deny the legal conclusion that the trustees of the Foundation were independent of the Hospital and had no duty to report to the Hospital. In response to said legal conclusion, the Foundation was formed by the Hospital pursuant to the provisions of Sections 501(c)(3) and 509(a)(3) of the Internal Revenue Code as a "support" Foundation to the Hospital, which was "controlled" by the Hospital in accordance with Sec-

tion 509(a)(3)(B). (Appendix to Pl. State. Uncontested Facts, A9) Section 509(a)(3) of the Internal Revenue Code, defines a support foundation as one which,

> (A) "Is organized, and at all times thereafter is operated exclusively for the benefit of, to perform the function of or to carry out the purposes of one or more specified organizations described in paragraph (1) or (2),
>
> (B) Is operated, supervised or controlled by or in connection with one or more organizations described in paragraph (1) or (2), and
>
> (C) Is not controlled directly or indirectly by one or more disqualified persons (defined in Section 4946) other than foundation managers and other than one or more organizations described in paragraph (1) or (2)." 26 U.S.C. Sec. 509(a)(3)

The Hospital exercised dominion and control over the Foundation as contemplated under Section 509(a)(3) by reserving to itself the right to elect the trustees and members of the Foundation. (Pl. State. Uncontested Facts, A21) Consequently, the trustees of the Foundation were not independent of the Hospital.

Plaintiffs admit that the Foundation was incorporated on December 20, 1983, and that in all material times, Sherwin J. Stone was the president of the Foundation and that its Trustees were appointed by the Hospital's Board of Trustees.

7. On June 7, 1984 the Foundation filed an Application for Recognition of Exemption under Section 501 (c)(3) of the Internal Revenue Code ("Application for Exemption") wherein it described that one of its proposed activities would be to assume responsibilities for the prudent investment and management of the funds entrusted to it and the "utilization of its earnings" to give financial support to the Hospital (Stone affidavit, par. 6; Applica-

tion for Exemption attached as Exhibit A, page 2, par. 3). In response to a specific question asked by the Internal Revenue Service in the Application for Exemption (Pt. III, 7 (b), to wit, "To what extent do you intend to use contributions as an endowment fund ie, hold contributions to produce income for the support of your exempt activities," the Foundation expressly stated, "The Foundation plans to utilize all assets received by it from the supported organization as an endowment fund to produce income for the support of the Foundation's exempt activities".

ANSWER: Admitted. Plaintiffs further respond by stating that the Foundation's Articles of Incorporation, which were attached as Exhibit III to the Foundation's Application for Exemption, the Foundation was specifically authorized to use both principal and interest to support the Hospital. (Pl. Stat. Uncontested Facts, A40)

8. On December 17, 1984 the Internal Revenue Service issued its exemption letter ruling that the Foundation would be exempt from income taxes "assuming that (its) operations will be as stated in (its) application for recognition of exemption" (Stone affidavit, par. 6; Exemption Letter attached as Exhibit B. par. 1).

ANSWER: Admitted.

9. At the December 20, 1984 Hospital Board of Trustees' meeting, Stone reported that the Central Community Foundation had been granted tax exempt status by the Internal Revenue Service on December 17, 1984 and that the Foundation would utilize assets received from the Hospital "as an endowment fund to produce income for the Foundation's exempt activities." The Hospital thereupon voted to transfer its investment portfolio to the Foundation (Stone affidavit, par. 7; Minutes of December 20, 1984 meeting attached as Exhibit C, p. 3).

ANSWER: Plaintiffs admit that at the December 20, 1984 Hospital Board of Trustees' meeting, Stone reported

that the Central Community Foundation had been granted tax exempt status by the Internal Revenue Code on December 17, 1984, and "that the Foundation will utilize *all assets* received by it from the corporation as an endowment fund to produce income for the support of the Foundation's exempt activities and *to give financial support to this corporation when required.*" (Pl. State Uncontested Facts, A11) Plaintiffs admit that the Hospital thereupon voted to transfer its investment portfolio to the Foundation pursuant to the following motion which was unanimously approved by the trustees:

> "Thereupon, Mr. Patrick S. DeMoon moved that this corporation transfer to Central Community Foundation all of the assets including accrued income thereon comprising the investment portfolio of the corporation held by Continental Bank of Chicago in account number 11-00292-02-0 to be used by the Foundation in accordance with its philanthropic and charitable purposes, and further moved that the officers of this corporation be authorized and directed to execute such documents as may be necessary or appropriate in order to effectuate the transfer herein above referred to." (Pl. State. Uncontested Facts, All)

10. In December, 1984 and February, 1985 the Foundation provided monies in the amounts of $70,000 and $115,000, respectively, for the purchase of two parcels of property to be used as professional office buildings by the Hospital's physicians (Stone affidavit, par. 8):

Answer: Admitted.

11. Between November 4, 1985 and January 22, 1990 the Foundation made the following unrestricted subventions to the Hospital (Stone affidavit, par. 9):

November 4, 1985	$ 250,000
February 24, 1986	100,000
December 3, 1986	1,000,000

January 27, 1987	1,000,000
June 27, 1987	1,000,000
November 25, 1987	1,000,000
January 15, 1988	600,000
April 15, 1988	1,000,000
August 11, 1988	1,000,000
November 8, 1988	1,000,000
March 2, 1989	1,000,000
June 29, 1989	1,000,000
October 18, 1989	1,000,000
January 22, 1990	1,000,000

ANSWER: Admitted.

12. Subsequent to the January 22, 1990 subvention, Foundation President Stone became concerned about the frequency of the Hospital's need for subventions. He requested the Comptroller of the Hospital, Harold Reisler, to prepare a list of all subventions date (Stone affidavit, par 10).

ANSWER: Plaintiffs deny that subsequent to the January 22, 1990 subvention Foundation President Stone *first* became concerned about the frequency of the Hospital's need for subventions. Plaintiffs state that the Hospital had been losing money for three years and was totally dependent upon the Foundation's subventions for its continued day to day operations. (Pl. State. Uncontested Facts, A69) Further, Stone, who was also an officer and trustee of the Hospital, was privy to the annual, audited financial statements of the Hospital and the Foundation which were prepared by Laventhol and Horwath, the accountants for the Hospital and Foundation. (Pl. Stat. Uncontested Facts, A293, A158, A182 and A205) Stone either knew or should have known of the fact that the Foundation had invaded principal with the October 18, 1989 subvention of $1,00,000. Harold Reisler, the in house accountant for both the Hospital and the

Foundation, was aware at the time of the October 18, 1989 subvention that principal was being used to support the Hospital. (Pl. State Uncontested Facts, A326 and A331-332) Plaintiff denies that Stone requested the Comptroller of the Hospital, Harold Reisler, to prepare a list of all subventions date. (Pl. State. Uncontested Facts, A332-A333)

13. In February, 1990 Stone received Reisler's report and learned for the first time that the Foundation's subventions to the Hospital had exceeded the Foundation's earnings and that the October 18, 1989 and January 22, 1990 subventions had invaded the Foundation's principal (Stone affidavit, par. 11).

ANSWER: Plaintiffs deny that in February, 1990 Stone received Reisler's report. (Pl. State. Uncontested Facts, A332-A333) Plaintiffs' deny that Stone learned for the first time in February 1990 that the Foundation's subventions to the Hospital exceeded the Foundation's earnings and that the Ocotber 18, 1989 and January 22, 1990 subventions had invaded the Foundation's principal. In further response, Plaintiffs state that Stone, an officer and trustee of both the Hospital and the Foundation, was privy to the financial affairs of the Hospital and Foundation through the audited financial statements of both the Hospital and the Foundation, and therefore, knew or should have known that the Foundation had invaded principal with its October 18, 1989 subvention of $1,000,000 to the Hospital. (Pl. State. Uncontested Facts, A293, A158, A182, A205)

14. Stone reviewed the Foundation's Application for Recognition of Exemption (Exhibit A) and the Internal Revenue Service's Exemption Letter (Exhibit B). He made the initial determination that the invasions of principal may have violated the terms of the exemption grant and could jeopardize the Foundation's tax exempt status (Stone affidavit, par. 11).

ANSWER: Plaintiffs admit that Stone reviewed the Foundation's Application for Recognition of exemption and the Internal Revenue Service's Exemption Letter. Plaintiffs deny that he made the *initial* determination that the invasions of principal may have violated the terms of the exemption grant and could jeopardize the Foundation's tax exempt status. Dr. Algirdas Maciunas, an officer and trustee of both the Hospital and the Foundation, testified in his deposition that Stone had advised him shortly after the Foundation was established in 1983 or 1984, that the Foundation was precluded from using principal to support the Hospital. (Pl. State. Uncontested Facts, A350-A351)

15. Stone advised the Hospital's Administrator, P.S. DeMoon, of the invasions of principal and the necessity to convene a meeting of the Hospital's Board of Trustees to advise them of the facts. (Stone affidavit, par. 12).

ANSWER: Admitted.

16. The Board of Trustees of the Hospital held a special meeting on February 19, 1990 at which Stone advised them that the Foundation had made subventions in excess of income, the legal and tax consequences would be researched and he would report back to them as soon as the research was completed (Stone affidavit, par. 18; DeMoon affidavit, pars. 3-4; Minutes of 2/19/90 Board of Trustees meeting attached hereto as Exhibit D). This was the first notice that the Trustees had of the invasions of principal. (See Stone dep. pp. 46-49; DeMoon dep. pp. 41-42; Maciunas dep. pp. 15-18, Sprtl dep. pp. 16-18; Burke dep. pp. 15-[illegible]5; Howard dep. pp. 13-15; gathered in Exhibit M).

ANSWER: Plaintiffs admit that the Board of Trustees of the Hospital had a special meeting on February 19, 1990, at which Stone advised them that the Foundation had made subventions in excess of income, that the legal and tax consequences would be researched, and that

Stone would report back to them as soon as the research was completed.

Plaintiffs deny that this was the first notice that all the trustees had of the invasions of principal. In support of this denial, Plaintiffs state that the common trustees of the Hospital and the Foundation had access to and were privy to the audited financial statements for both the Hospital and the Foundation, and therefore, knew or should have known that the Foundation had used principal to support the Hospital with its October 18, 1989 subvention to the Hospital in the amount of $1,000,000. (Pl. State. Uncontested Facts, A293, A319, A158, A182, A205)

17. At the same meeting, Stone advised the Hospital Trustees that the Foundation may be precluded from making further subventions in excess of income until the past invasions of principal were repaid (id.).

ANSWER: Admitted.

18. Thereafter, Stone discussed the legal and tax issues with attorneys at Altheimer & Gray and with accountant Thomas Trabon, at Laventhol & Horwath, the certified public accounting firm representing the Foundation and the Hospital. The attorneys provided Stone with a memorandum (Exhibit E) and Trabon orally confirmed the conclusions reached by the attorneys (Stone affidavit, par. 14).

ANSWER: Plaintiffs admit that Stone discussed legal and tax issues with attorneys at Altheimer & Gray and with accountant Tom Trabon, at Laventhol and Horwath, the certified public accounting firm representing the Foundation and the Hospital. Plaintiffs admit that the attorneys provided Stone with a memorandum (Exhibit E). Plaintiffs move to strike the assertion that "Trabon orally confirmed the conclusions reached by the attorneys" on the grounds of hearsay.

19. The Board of Trustees of the Foundation met at 11:00 a.m. on February 26, 1990. Stone reported what the attorneys and accountants had advised him. The Trustees resolved to cease making subventions to the Hospital until the Hospital repaid the invasions of principal, the Foundation earned sufficient monies to offset the invasions or the Foundation received a ruling from the Internal Revenue Service permitting the payment of principal to the Hospital (Stone affidavit, par. 15).

ANSWER: Admitted. Plaintiffs further state that the Foundation never sought a ruling from the Internal Revenue Service to permit the payment of principal to the Hospital. (Pl. State. Uncontested Facts, A307)

20. The Board of Trustees of the Hospital reconvened their February 19, 1990 meeting on February 26, 1990 at 12:00 noon. At that meeting Stone advised the Hospital Trustees that continued subventions could jeopardize the Foundation's tax exempt status and that the Foundation had voted to make no further subventions to the Hospital until the past invasions of principal had been repaid or the Foundation had earned sufficient monies to offset the past invasions of principal (Stone affidavit, par. 16); Minutes of 2/26/90 Board of Trustees meeting attached hereto as Exhibit F).

ANSWER: Admitted.

21. Following Stone's announcement to the Hospital's trustees that the Foundation would make no further subventions, Patrick S. DeMoon told the Hospital Trustees that the Hospital had cash on hand plus anticipated cash receipts to keep the Hospital open for approximately two weeks. The Hospital Trustees thereupon voted to close the Hospital effective March 14, 1990 and immediately notify the employees of the impending closure (id; DeMoon affidavit, pars. 5-7). Prior to the February 20, 1990 meeting, the Trustees had never discussed the closure of the Hospital.

ANSWER: Plaintiffs admit all of paragraph 21 except the last sentence, which is denied since defendants offer no evidentiary support.

22. Following the meeting of the Hospital's Board of Trustees, the Hospital convened a meeting of the Hospital's department heads. At that meeting Harold Reisler read a letter (Exhibit G) signed by P.S. DeMoon announcing the closure of the Hospital effective March 14, 1990. The department heads were provided with copies of the letter that had been read by Reisler and were told to return to their departments and advise their employees of the closure (DeMoon affidavit, par. 8; Reisler affidavit, par. 8).

ANSWER: Admitted.

23. Copies of the same letter were posted throughout the Hospital and each employee (including each named plaintiff) received a copy of the notice in his next pay envelope (distributed on March 8, 1990) (DeMoon affidavit, par. 9; Reisler affidavit, pars. 9-10).

ANSWER: Plaintiffs admit that each employee received a copy of the notice in his next pay envelope distributed on March 8, 1990. Plaintiffs deny that copies of the same letter were posted throughout the Hospital. (Pl. State Uncontested Facts, A394 and A320-1)

24. The Hospital's closure was publicly announced on February 26, 1990 and was the topic of news coverage on television, radio and in the local newspapers (Stone affidavit, par. 17; Newspaper stories attached as Exhibits H and I).

ANSWER: Admitted.

25. The Hospital closed on March 14, 1990 and all employees were terminated effective that date except for a limited number of security, custodial and administrative employees who were retained to wind down the affairs of the Hospital (Complaint, par. 20).

ANSWER: Admitted.

26. Prior to January 1, 1987 full time Hospital employees were paid for accumulated but unused sick days at the end of each year (DeMoon affidavit par. 10).

ANSWER: Admitted.

27. Effective January 1, 1987 the Hospital implemented a new sick leave policy which stated that unused sick days could be accumulated to twenty-four days and used against future absences due to sickness but any unused sick days would no longer be paid in cash either at the end of the year or upon termination of employment. The policy was set forth in a January 5, 1987 memorandum to all Department Heads (id; Exhibit J).

ANSWER: Plaintiffs admit that effective January 1, 1987 the Hospital implemented a new sick leave policy, which stated that unused sick days could be accumulated to 24 days and used against future absences due to sickness, but any unused sick days would no longer be paid in cash at the end of the year. Plaintiffs deny that the new sick leave policy provided that any unused accumulated sick days would no longer be paid in cash upon termination of employment. (Pl. State. Uncontested Facts A127) The new sick leave policy effective January 1, 1987 eliminated the prior sick leave policy in effect dated March 1985 that accumulated sick days would not be paid upon termination of employment. (Compare Ex. N and Ex. M, Pl. State. Uncontested Facts, A127 and A126) The policy set forth in the January 5, 1987 memorandum to all department heads did not accurately reflect the new sick leave policy dated January 1987 (Pl. State. Uncontested Facts, A127), and further, was not distributed to the employees. (Pl. State. Uncontested Facts, A398, A418, A389-1)

28. On or about January 15, 1987 each employee received a written notice in his paycheck advising him of the new sick leave policy (id; Exhibit K).

ANSWER: Denied. (Pl. State. Uncontested Facts, A398-1, A381-1, A394-1, A417-1)

Plaintiffs submit the following facts which would preclude the granting of summary judgment in favor of the Hospital:

1-60. Plainitffs repeat and incorporate by reference herein paragraph 1-60 of their Statement of Uncontested Facts and Appendix in support of their Motion for Summary Judgment as facts that would preclude the granting of summary judgment in favor of the Hospital.

Respectfully submitted,

MYRNA JURCEV, *et al.*

By: /s/ Joseph D. Keenan, III
Their Attorney

JOSEPH D. KEENAN, III
PUCHALSKI, KEENAN & REIMER
20 North Wacker Drive, Suite 1700
Chicago, IL 60606
(312) 332-4428

DAVID J. STETLER
MCDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 984-7744

Attorneys for Plaintiffs

STATUTORY PROVISIONS

The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2102(a) and (b), provides:

> (a) NOTICE TO EMPLOYEES, STATE DISLOCATED WORKERS UNITS AND LOCAL GOVERNMENTS.—An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and
>
> (2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act) and the chief elected official of the unit of local government within which such closing or layoff is to occur.
>
> If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.
>
> (b) REDUCATION OF NOTIFICATION PERIOD—(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.
>
> (2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day

period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

The WARN Act, 29 U.S.C. § 2104(a)(1) provides:

(a) CIVIL ACTIONS AGAINST EMPLOYERS— (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compenation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

The WARN Act, 29 U.S.C. § 2107(a), provides:

> (a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for the appropriate service of notice as required by this chapter.

(2)

No. 93-1301

Supreme Court, U.S.
FILED
APR 14 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, CAROL RYNNE, PEGGY SCHULTZ, ROSEMARY RIORDAN and DR. COSETTE Z. VILLANUEVA,

Petitioners,

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation, and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN A. DIENNER, III
LYDON & GRIFFIN
100 West Monroe Street
Eighteenth Floor
Chicago, Illinois 60603
(312) 346-9538

Attorney for Respondent Central Community Hospital

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit properly affirmed the judgment of the District Court, which found, based on undisputed facts, that Central Community Hospital's sudden loss of financial support constituted an "unforeseeable business circumstance" under 29 U.S.C. §2102(b)(2)(A), and thus permitted the Hospital to close by giving sixteen rather than sixty days' notice to employees.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 2

A. The Proceedings Below 2

B. Statement of Facts 3

ARGUMENT 6

I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD AND CORRECTLY DETERMINED THAT THE HOSPITAL COULD NOT REASONABLY FORESEE THE FOUNDATION'S SUSPENSION OF SUBVENTIONS 8

II. THERE IS NO SPLIT OF AUTHORITY BETWEEN CIRCUITS 10

III. THIS CASE IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT 12

IV. PETITIONERS MISSTATE FACTS, REVERSE THEIR POSITION TAKEN BELOW AND ASSERT A LEGAL POSITION FOR THE FIRST TIME IN THIS COURT 13

CONCLUSION 16

APPENDIX

Corrected Transcript of District Court Opinion ..... App. 1

Affidavit of Sherwin J. Stone ..... App. 13

TABLE OF AUTHORITIES

Page

CASES

Bankers Trust Company v. Mallis, 435 U.S. 381, *reh'g denied*, 436 U.S. 915 (1978) 16

Burks v. Lasker, 441 U.S. 471 (1979) 11

Butner v. United States, 440 U.S. 48 (1979) 11

E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 10

Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276 (E.D. Tenn. 1990) 7

Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) 11

N.L.R.B. v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) 10

Rogers v. Lodge, 458 U.S. 613, *reh'g denied*, 459 U.S. 899 (1982) 10

Ross v. Moffitt, 417 U.S. 600 (1974) 10

Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938) 11

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 11

Texas v. Mead, 465 U.S. 1041 (1984) 10

United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987) 11

United States v. One Parcel of Land, 965 F.2d 311 (7th Cir. 1992) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

26 U.S.C. §501 (1988) 3

26 U.S.C. §509 (1988) 4

29 U.S.C. §2101 *et seq.* (1988) ..... *passim*

OTHER AUTHORITIES

Stern et al., Supreme Court Practice (Bureau of National Affairs, Inc., 7th ed. 1993) 12

H. R. Rep. No. 285; 100th Cong., 1st Sess. at 34 (1987) 7

Dislocated Workers: WARN Act Not Meeting Its Goals; Report to Congressional Committees, GAO/HRD 93-18 (1993) 12

Implementation of the WARN Act, Before the Subcommittee on Labor of the Senate Committee on Human Resources, Feb. 23, 1993 ..... 3, 13

WARN Act Final Rule, 54 Fed. Reg. 16062 (1989) 7

OPINIONS BELOW

Petitioners' Appendix contains an inaccurate version of the opinion of the United States District Court for the Northern District of Illinois. The original transcript of the District Court's oral ruling on March 5, 1992 contained several errors. The corrected transcript, which the Court of Appeals considered, is contained in the Appendix attached to this Brief. The District Court's opinion was not reported in an official reporter.[1]

JURISDICTION

Respondent supplements Petitioners' jurisdictional statement only to note that on March 4, 1994, Respondent requested an extension of time to file its Brief in Opposition to Petition for a Writ of Certiorari. On March 8, 1994,

[1] The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were Petitioners Myrna Jurcev, Stanley Miller, Florence Moore, Carol Rynne, Peggy Schultz, Rosemary Riordan, and Dr. Cosette Z. Villanueva, and Respondent Central Community Hospital, an Illinois not-for-profit corporation. The Prairie Foundation, formerly Central Community Foundation, an Illinois not-for-profit corporation, while listed in the caption in this case, was *not* a party to those proceedings, nor is it a respondent in this Court. In accordance with Supreme Court Rule 29.1, Respondent Central Community Hospital states that it was an Illinois not-for-profit corporation, with its principal (and only) place of business formerly located in Chicago, Illinois. Central Community Hospital has no parent or subsidiary companies.

the Chief Deputy Clerk of this Court granted Respondent's request, which extended the time for filing a Brief to April 14, 1994.

COUNTERSTATEMENT OF THE CASE

A. The Proceedings Below

Petitioners, a class of former employees, filed a complaint against Central Community Hospital ("the Hospital"), alleging that the Hospital violated the Worker Adjustment Retraining Notification Act ("WARN Act") by closing on March 14, 1990 without providing sixty days' advance notice. They joined two state law claims seeking recovery of unused sick pay.

In defense, the Hospital relied on 29 U.S.C. §2102(b)(2)(A), a WARN Act provision which permits an employer to close with fewer than sixty days' notice if it faces "unforeseeable business circumstances." The Hospital filed a motion for summary judgment, arguing that its unexpected loss of funding was such a business circumstance. Petitioners filed a cross-motion for summary judgment.[2]

On March 5, 1992, the District Court granted the Hospital's summary judgment motion, denied Petitioners' motion, and dismissed the state law claims for lack of subject matter jurisdiction. Judgment was entered

---

[2] Petitioners also filed an Amended Complaint which named Central Community Foundation ("the Foundation") as an additional defendant. Petitioners never served the Foundation with process, it filed no appearance and played no role in the case, and it is not a respondent in this Court.

in the Hospital's favor the next day. On March 20, 1992, the District Court modified the judgment to include dismissal of the Foundation.

On April 20, 1992, Petitioners filed a notice of appeal with the United States Court of Appeals for the Seventh Circuit. On October 14, 1993, a unanimous panel of the Court of Appeals affirmed the District Court on all grounds. Thereafter, Petitioners secured new counsel and filed the instant Petition for a Writ of Certiorari.[3]

B. Statement Of Facts

The Hospital was an Illinois not-for-profit corporation, exempt from federal income taxes under 26 U.S.C. §501(c)(3) of the Internal Revenue Code ("the Code"). Pet. App. 3a.[4] In December, 1983, the Foundation was incorporated as an Illinois not-for-profit corporation to act as a

---

[3] Petitioners are now represented by attorneys from the National Lawyers Guild/Maurice and Jane Sugar Law Center for Economic and Social Justice ("Law Center"), a national public interest law office with particular emphasis on the WARN Act. "[T]he Law Center" is "a nationally recognized clearinghouse regarding all aspects of the WARN Act, with [its] primary emphasis on . . . enforcement. . . . " *Implementation of the WARN Act, Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, Feb. 23, 1993 (statement of Julie H. Hurwitz, Executive Director, Law Center).

[4] References to documents contained in the Appendix to the Petition for a Writ of Certiorari are identified, e.g., as "Pet. App. 1a." References to the documents contained in the Appendix to this Brief are identified, e.g., as "Res. App. 1." References to the Petition for a Writ of Certiorari are identified, e.g., as "Pet. 1." References to Petitioners' Brief in the Court of Appeals are identified, e.g., as "Pet. Brief 1."

support foundation for the Hospital under 26 U.S.C. §509(a)(3) of the Code. *Id.* As the Code required, the Hospital's Board of Trustees appointed the Foundation's trustees; however, once appointed, Foundation trustees were independent of the Hospital and owed separate fiduciary duties to the Foundation. Pet. App. 3a, 11a.

The Foundation's Articles of Incorporation permitted it to use both principal and interest to support the Hospital. Pet. App. 3a-4a. However, when the Foundation filed its Application for Exemption from federal income taxes with the Internal Revenue Service ("IRS"), it declared an intention to create an endowment fund and use *only income* from the fund to support the Hospital. Pet. App. 4a.

On December 17, 1984, the IRS issued a letter stating that the Foundation would be exempt from taxes "assuming [its] operations will be as stated in" the Application. *Id.* The Hospital then transferred its investment portfolio to the Foundation. *Id.*

In the next five years, the Foundation distributed $11,950,000 to the Hospital. *Id.* In late January, 1990, Sherwin Stone, the attorney for both the Foundation and the Hospital and a Hospital and Foundation Trustee, grew concerned about the frequency and amount of these cash transfers, and asked the Hospital's comptroller to prepare a list of all subventions and to calculate all income the Foundation earned. Pet. App. 3a-4a; Res. App. 15. When Stone received this information in February, 1990, he learned for the first time that the October 18, 1989 and January 22, 1990 subventions had invaded the endowment fund's principal. Pet. App. 4a; Res. App. 4,

15. Stone reviewed the Application and the IRS's exemption letter. Res. App. 15. He concluded that the October, 1989 and January, 1990 invasions of principal may have violated the terms of the Foundation's tax exemption, and was concerned that further subventions could jeopardize the Foundation's tax exempt status. Res. App. 15.

Stone discussed the consequences of the invasions of principal with lawyers and accountants for the Foundation and the Hospital. Pet. App. 5a. The attorneys concluded that further subventions of principal could jeopardize the Foundation's tax exempt status, and, given the Hospital's financial distress, additional advances or loans could be deemed a wasting of the Foundation's assets and a breach of the trustees' fiduciary duties which could subject them to personal liability. Pet. App. 5a, 10a. Although the loss of tax exemption seemed "unlikely," the attorneys recommended that the Foundation make no further subventions until it obtained an IRS ruling, a process which could take months. Pet. App. 5a, 45a. The accountants agreed. Pet. App. 5a.

On February 26, 1990, the Foundation's trustees met. *Id.* Stone told them of the advice from the attorneys and accountants, including the risk of personal liability if they approved further subventions. Pet. App. 5a; Res. App. 8. Exercising their independent authority, the trustees resolved to cease making subventions until one of three events occurred: the Hospital's repayment of the invasions of principal, replacement of the invasions with future earnings, or an IRS ruling permitting distributions of principal. Pet. App. 5a.

The Hospital's trustees met later that day. *Id.* Stone reported that the Foundation would not make further subventions until one of the three specified events occurred. *Id.* The Hospital could not overrule the Foundation's action or force it to change its resolution. Pet. App. 11a, 14a. The Hospital's administrator reported that the Hospital only had enough cash to remain open for two weeks. Pet. App. 5a. The Hospital's trustees therefore voted to close the Hospital on March 14, 1990, the date the Hospital's cash was projected to run out, and immediately began to notify employees of the impending closure. Pet. App. 5a-6a.

ARGUMENT

Under the WARN Act, an employer ordinarily may not order a plant closing until sixty days after it gives written notice to affected employees or their representative. 29 U.S.C. §2102(a). However, 29 U.S.C. §2102(b)(2)(A) permits a plant closing with fewer than sixty days' notice if it is "caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required [i.e., sixty days before actual closing]." The lower courts held that the Hospital was excused from giving notice before February 26, 1990, because the closing was caused by business circumstances that were not reasonably foreseeable. On that day the Hospital learned that it would receive no further money from the Foundation until one of the three specified events occurred. The Hospital did not and could

not reasonably foresee the Foundation's decision.[5] As the Hospital only had enough cash to stay open for two weeks, it set March 14, 1990 as the closing date, and promptly notified employees and explained the reason for reduced notice. Based on these undisputed facts, the lower courts agreed that the Hospital was excused from giving sixty days' notice, and that the Hospital's diligent efforts to provide immediate notice to all employees met its statutory obligation to give as much notice as practicable under the circumstances.

Petitioners nonetheless contend that this Court should review this case because the Seventh Circuit improperly interpreted the WARN Act, its opinion conflicts with First Circuit cases concerning the doctrine of imputed corporate knowledge, and this case is important.

---

[5] As noted by the District Court, loss of funding is an example of an unforeseeable business circumstance. App. 7. *See* WARN Act Final Rule, 54 Fed. Reg. 16062 (1989) ("[S]trikes or lockouts elsewhere, loss of or failure to award contracts, unexpected major market downturns, fires, changes in prices and costs, declines in customer orders, State and local regulatory changes, . . . loss of raw materials, *loss of financing*, legislation, court decisions, . . . other and secondary effects of economic conditions . . . may constitute unforeseeable business circumstances") (emphasis added). *See also*, H. R. Rep. No. 285; 100th Cong., 1st Sess. at 34 (1987) (unforeseeable business circumstances typified by loss of business of principal customer causing employer's financial institutions to suspend all credit and recall outstanding loans, resulting in closure); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276, 1287 (E.D. Tenn. 1990) (cancellation of nearly all orders from main customer was unforeseeable business circumstance, despite customer's prior removal of some business and warning that if defendant's quality did not improve, "more drastic action" would result).

As detailed below, the Petitioners' arguments are without merit. In addition, Petitioners have misstated material facts and changed their position from that asserted below. The Petition therefore should be denied.

I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD AND CORRECTLY DETERMINED THAT THE HOSPITAL COULD NOT REASONABLY FORESEE THE FOUNDATION'S SUSPENSION OF SUBVENTIONS.

Petitioners erroneously assert that the Court of Appeals mistakenly applied a "subjective test" instead of an "objective test" in determining whether the cessation of funding was reasonably foreseeable to the Hospital. Pet. 12-14. Assuming, *arguendo*, there are such "tests," the Court of Appeals applied both of them:

> [N]o one on the Hospital's Board *knew or had reason to know* until February of 1990 that the Foundation had invaded principal in making subventions to the Hospital or that the invasions of principal might have jeopardized the Foundation's tax exempt status, and no one on the Hospital's Board *knew or should have known* until February 26, 1990, that the Foundation would cease making subventions.

Pet. App. 17a-18a (emphasis added).

Petitioners also fault the Hospital for failing to "take all steps necessary to see that the subventions from the Foundation continued without interruption[,]" "[maintain] closely" the Foundation's assets "to avoid dipping

into its principal[,]" and "do everything possible to guarantee the continuation" of subventions. Pet. 15-18. However, these actions were outside the Hospital's control:

> [T]he Hospital did not have control over the Foundation. . . . [E]ach member of the Foundation's Board owed an independent fiduciary duty to the Foundation. . . . The Hospital's sole power over the Foundation's Board was to appoint all of its members each year. The Hospital had no power to remove or suspend a member of the Foundation's Board, or to veto the Board's decisions.

Pet. App. 11a.

Petitioners' further contention to this Court that the Foundation was prohibited from making distributions from principal (Pet. 17) conflicts with the position they took in both courts below. There they argued that "the Foundation was permitted, if not required, to use principal in furtherance of its stated purpose as a support vehicle for the Hospital." Pet. Brief 29-30. Petitioners simply asserted that the legal and accounting advice the Foundation received was wrong and should have been ignored.

Of course, if Petitioners were correct that the Foundation mistakenly relied upon plainly erroneous advice, that would make the Foundation's decision to cease making subventions clearly unforeseeable. Apparently sensing the second edge of that sword, Petitioners' new counsel reverses their original position and now asserts that the Foundation was flatly prohibited from making subventions from principal. According to Petitioners' current position, Hospital Trustees were neglectful for not

anticipating the virtual certainty of a funding cut-off: "[T]he Hospital and its Trustees knew or should have known that future subventions from the Foundation to the Hospital were jeopardized if the Foundation's principal was touched." Pet. 16-17. Petitioners are barred from asserting this position for the first time on appeal. *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *Rogers v. Lodge*, 458 U.S. 613, 628, n.10, *reh'g denied*, 459 U.S. 899 (1982).

Finally, even if the Court of Appeals' ruling was in error, this Court does not grant certiorari petitions to merely reweigh evidence, analyze factual findings, or otherwise "correct" allegedly erroneous decisions. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (certiorari not granted to review evidence and discuss facts); *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176, n.8 (1981) (questions of fact do not merit certiorari review); *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (erroneous judgment below not basis for certiorari review).

II. THERE IS NO SPLIT OF AUTHORITY BETWEEN CIRCUITS.

Petitioners claim that the Court of Appeals' supposed failure to recognize and apply the doctrine of imputed corporate knowledge "is directly at odds" with holdings from the First Circuit. Pet. 20-21. This argument is plainly contrived. In fact, the First and Seventh Circuits *fully agree* on the law of imputed corporate knowledge. Both hold that knowledge of officers, directors, and other

agents is imputed to the corporation if received within the scope of the agency and concerns a matter within the scope of the agent's authority. *See, e.g., Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992); *United States v. One Parcel of Land*, 965 F.2d 311, 316 (7th Cir. 1992) (citing *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987)).

Second, the doctrine of imputed corporate knowledge and other corporate agency principles, while often applied in federal cases, are matters of *state* law. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977) (unless Congress provides otherwise, state law governs corporations' internal affairs); *Burks v. Lasker*, 441 U.S. 471, 477-78 (1979) (federal courts *not* authorized to fashion a complete body of federal corporate law). This Court does not grant certiorari merely to review questions of state law, or conflicts between states' laws. *Butner v. United States*, 440 U.S. 48, 57-58 (1979); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

Finally, the Seventh Circuit in fact correctly applied the doctrine of imputed corporate knowledge. Even if before February, 1990, the Hospital "knew" that principal had been invaded, the Hospital did not therefore "know," actually or constructively, that the Foundation would immediately suspend subventions. Not until the Foundation obtained legal and accounting advice did it decide, in the exercise of independent judgment, to suspend subventions. Res. App. 8. Indeed, the Foundation could have agreed with Petitioners' strenuous arguments below that nothing prevented it from distributing principal to the Hospital. The Hospital did not and could not reasonably

foresee the Foundation's decision to suspend subventions immediately.

III. THIS CASE IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT.

This case does not present significant issues warranting this Court's review. In the absence of a constitutional issue or a conflict among circuits, this Court generally declines to review decisions involving federal statutes unless the decision raises particularly important issues or seriously thwarts effective administration of federal law.[6] The decision below has no such effect.

Despite Petitioners' dire warnings of mass evasion of the WARN Act through the unforeseeable business circumstances exception, they offer no evidence that the exception has been frequently asserted. In fact, Congressional reports and testimony suggest the contrary. Although the General Accounting Office study to which Petitioners refer (Pet. 22) criticized many portions of the WARN Act, it does not fault the unforeseeable business circumstances exception, let alone find that it is often used or abused.[7] Notably, the Executive Director of the Project for which Petitioners' attorneys work testified

---

[6] *See Stern et al., Supreme Court Practice*, 187-88 (Bureau of National Affairs, Inc., 7th ed. 1993).

[7] *Dislocated Workers: WARN Act Not Meeting Its Goals; Report to Congressional Committees*, GAO/HRD 93-18 (1993).

that the WARN Act is deficient in at least fourteen different ways, but said nothing about the unforeseeable business circumstances exception.[8]

Furthermore, the highly unusual issues presented in this case (involving the interplay between a not-for-profit hospital and a foundation which funds it) are unlikely to recur, and there is no conflict in the federal courts over the application or interpretation of the unforeseeable business circumstances exception.

IV. PETITIONERS MISSTATE FACTS, REVERSE THEIR POSITION TAKEN BELOW AND ASSERT A LEGAL POSITION FOR THE FIRST TIME IN THIS COURT.

This case is inappropriate for review because of Petitioners' misstatements of fact and of the record, and their reversal on a key position they took below.

First, contrary to Supreme Court Rule 14(b), Petitioners failed to properly identify the parties to the proceedings below. Petitioners also repeatedly refer in the plural to "Respondents."[9] As noted above, the Hospital was the only defendant before the courts below and is the only Respondent before this Court. The Court of Appeals

---

[8] *Implementation of the WARN Act, Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, Feb. 23, 1993 (statement of Julie H. Hurwitz, Executive Director, Law Center).

[9] Pet. at 1 (Caption); 6 ("according to the Respondents"); 10 ("the Respondents had failed"); 15 ("their lack of knowledge"); 18 ("key premise of the Respondents").

specifically found that the Foundation did not "participate in the defense of the case." Pet. App. 7a.

Second, Petitioners erroneously assert that

> the Seventh Circuit made one other serious error. There was a legitimately important question of whether the invasion of principal legally jeopardized the *Hospital's* tax exemption. Yet, in applying a subjective test, the Court accepted this *key premise of the Respondents* (sic), without ascertaining if this premise was the result of "commercially reasonable" business judgment.

Pet. 18 (emphasis added). The Hospital never asserted that *its* tax exempt status was at risk. Instead, as both opinions below demonstrate, the *Foundation*'s tax exempt status, not the Hospital's, was at risk. Pet. App. 10a; Res. App. 4.

Third, Petitioners offer this misleading statement:

> Despite having received annual audited financial statements for the Hospital and Foundation . . . Mr. Stone claimed that he learned for the first time in February 1990 that the subventions to the Hospital had invaded the Foundation's principal. . . .

Pet. 7. Mr. Stone did not just "claim" to learn about the invasion of principal in February – such discovery in February is a matter of *uncontested fact*. Res. App. 4. Moreover, Petitioners' disingenuous reference to Stone's receipt of "annual audited financial statements" implies that he knew about the invasion of principal before February. As Petitioners know, financial statements reflecting the invasion of principal were not prepared until "at the

earliest" June, 1990, months after the Hospital closed. Pet. App. 16a.

Fourth, Petitioners' Appendix contains an inaccurate version of the trial court's opinion. After the trial court orally ruled, it corrected several errors in the transcript of its ruling. The corrected *final* transcript, which the Court of Appeals considered, is contained in the Appendix to this Brief.[10]

Finally, as explained above, Petitioners reverse their position below on a key issue. Petitioners argued below that the Foundation had every right – indeed, the duty – to make subventions from principal, and that in suspending subventions, the Foundation relied on defective advice. Pet. Brief 29-31. Having lost twice on this issue, Petitioners have reversed this position and now assert that the Foundation could not make subventions from principal, and the Hospital should have anticipated the certainty of a funding cut-off when the Foundation exhausted its income. Pet. 15-18. Thus, Petitioners say, the suspension of subventions was foreseeable. Petitioners cannot assert a position in this Court which directly

---

[10] Petitioners also omit the fact that the Hospital gave sixteen days' notice of closing, and the finding by both courts below that this was the most notice possible under the circumstances. Petitioners repeatedly imply that no notice at all was given. *See, e.g.*, Pet. at 2 (Hospital closed without the required "60 day notice"), 9 ("Hospital closed without giving the 60 days written notice required by the WARN Act"). Petitioners thus ignore that the WARN Act permits shorter notice if unforeseeable business circumstances cause the closing.

contradicts its argument below. *Bankers Trust Company v. Mallis*, 435 U.S. 381, 388, *reh'g denied*, 436 U.S. 915 (1978).

CONCLUSION

The parties concur that the unforeseeable business circumstances exception should be limited to "circumstances that are extraordinary and unpredictable, and thus, are not reasonably foreseeable." Pet. 12-13. The courts below applied this exception to undisputed facts, agreeing that the Hospital's sudden loss of funding was unforeseeable. Petitioners failed to show that these courts erred, or that this case merits this Court's attention. Petitioners' argument simply expresses their belief that the courts below should have ruled in their favor. This is not a proper basis for granting certiorari. Respondent Central Community Hospital therefore respectfully requests that the Petition be denied.

Respectfully submitted,

JOHN A. DIENNER, III
LYDON & GRIFFIN
100 West Monroe Street
Eighteenth Floor
Chicago, Illinois 60603
(312) 346-9538

Dated: April 14, 1994

Attorney for Respondent

CORRECTED TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MYRNA JURCEV, et al., Plaintiffs, v. CENTRAL COMMUNITY HOSPITAL, an Illinois corporation, Defendant.	)))))))))	No. 90 C 1798 Chicago, Illinois March 5, 1992 10:15 a.m. Ruling

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

(Filed Jun. 12, 1992)

APPEARANCES:

For the Plaintiff: PUCHALSKI, KEENAN & REIMER, by
MR. PATRICK KEENAN
20 North Wacker Drive
Suite 1700
Chicago, Illinois 60606

For the Defendant: LAW OFFICES OF JAMES S. MONTANA, JR., by
MR. JOHN A. DIENNER, III,
Of Counsel
100 West Monroe Street
Suite 1800
Chicago, Illinois 60603

Court Reporter: Wanda L. Barnes
Official Court Reporter
219 South Dearborn Street
Suite 1918
Chicago, Illinois 60604
312 435-5568

[p. 2] THE CLERK: 90 C 1798, Jurcev, et al., v. Central Community Hospital.

MR. KEENAN: Good morning Your Honor. Patrick Keenan on behalf of the plaintiffs.

MR. DIENNER: John Dienner on behalf of Central Community Hospital.

THE COURT: I have before me a motion for summary judgment by Central Community Hospital. This action – if you want to be seated, you may want to because this is going to take a few moments.

This action arises under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. Section 2101 (the WARN Act). I have jurisdiction pursuant to 28 U.S.C. 1331, and the supplemental jurisdiction is invoked over the related counts.

There is essentially a three-count class action filed in March of 1990. It alleges violations of the WARN Act, alleges breach of contract, and then some violations of the Illinois Wage Payment and Collection Act. Both parties have moved for summary judgment.

There are no material facts in dispute. There is some dispute as to what implications are to be drawn from the facts, but the material facts are not essentially in dispute.

Central Community Hospital was an Illinois not-for-profit corporation located in Chicago. It was, as is usually the case, exempt from federal income tax. Plaintiffs were [p. 3] employees of the Hospital in various positions.

Central Community Foundation was incorporated in 1983 and was formed by resolution of the Board of Trustees of the Hospital as a supporting foundation. The Foundation's Articles of Incorporation permitted it to invest and distribute both principal and earnings for the benefit of the Hospital. However, the Foundation specifically advised the Internal Revenue Service in its exemption application that it would not distribute principal to the Hospital if exempt status were conferred. The Foundation established an endowment fund to produce income which was periodically subvented to the Hospital. The Foundation was issued an exemption letter by the IRS at the end of 1984 "based upon information supplied and assuming your operations will be as stated in your application."

The Hospital trustees then transferred the Hospital's entire investment portfolio (assets somewhere in excess of 19 million dollars) to the Foundation. The Foundation made some unrestricted subventions to the Hospital from December 1984 until January 22, 1990, in unscheduled payments, made over a period of time – made in installments, totaling approximately three million dollars a year.

The Hospital's financial condition had been deteriorating for several years before its closure in March of

1990. The Hospital was in fact dependent upon the Foundation's subvention [p. 4] to cover its losses and remain open.

Sometime in February 1990 the Foundation's president, Sherwin Stone, requested that the comptroller of the Hospital prepare a list of all subventions to date. When Stone received the report, he learned that the Foundation's subventions to the Hospital had exceeded the Foundation's earnings and had invaded the principal. Stone told the Hospital's administrator, P.S. DeMoon, of the invasions of principal, and a meeting of the Hospital Board was convened on February 19, 1990.

During the February 19, 1990, meeting Stone advised the Hospital Board that the legal and tax consequences of the invasion of principal were being researched and that he would report back to the Hospital Board. He further informed the Board that the Foundation might be precluded from making further subventions in excess of income until past invasions of principal were repaid.

After this Stone discussed the legal issues with attorneys at his firm and the tax issues with the accounting firm representing the Hospital and the Foundation. The attorneys provided Stone with a written memorandum of law which concluded that further subventions in excess of income may jeopardize the tax exempt status of the Foundation and may result in personal liability against the individual Foundation Board members for breach of their fiduciary duties. In a series of conversations with Stone the tax consultant confirmed the conclusions reached [p. 5] by the attorneys.

February 26th, 1990, the Foundation Board of Trustees met and Stone reported what the attorneys and accountants had advised him. Not surprisingly the trustees resolved to cease making subventions to the Hospital until the Hospital repaid the invasions of the principal, or the Foundation earned sufficent [sic] monies to offset the invasions, or the Foundation received a ruling from the IRS permitting the payment of principal to the Hospital.

Also on that date the Hospital Board convened and Stone apprised them of the situation, and included in his briefing to them news of the Foundation's resolution to halt further subventions. The Hospital Board debated the alternatives and heard from the Hospital director, Mr. DeMoon, who reported that the Hospital could stay open for approximately two weeks based on the current cash receipts. The Hospital trustees then voted to close the Hospital effective March 14, 1990, and immediately began to notify the Hospital employees of the impending closure.

On February 26th the Hospital convened another meeting – this time of the department heads. The department heads were apprised of the situation and given written copies of a letter by P.S. DeMoon announcing the closure of the Hospital on March 14, 1990. The department heads were instructed to return to their departments and advise their employees of the closure. [p. 6] Copies of the letter were posted throughout the Hospital. The closure was publicly announced on February 26th and printed stories appeared in the media the following day.

Some additional notice was also provided in the form of slips in the next pay envelope, the next pay envelopes of all the employees. That I believe was on March 8, 1990. And the Hospital did in fact close on March 14, 1990.

Section 2102 of the WARN Act says, among other things, that:

> "An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order to each representative of the affected employees as of the time of the notice or, if there is no representative at that time, to each affected employee."

There is no dispute here that on February 26, 1990, there was a "plant closing" due to the Hospital's closure, or that the plaintiffs were "affected employees" or that the employees suffered an "employment loss" under the Act. And the defendant obviously is not contending that they provided 60-day notice as the WARN Act requires.

Rather, they contend that "unforeseen business circumstances" excused it from giving the required 60-day notice to its employees under the WARN Act.

[p. 7] 2102(b)(2)(A) of the WARN Act allows such a reduction of the notification period and it provides:

> "An employer may order a plant closing or a mass layoff before the conclusion of the 60-day period if the closing or mass layoff was caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

The Hospital's loss of financial support from the Foundation qualifies as a "business circumstance" under the Act. The Department of Labor has identified loss of financing as an example of an unforeseeable business circumstance under the Act. This appears in Vol. 54 of the Federal Register, No. 75, at page 16062.

Essentially from 1985 to 1990 the Hospital was functioning at over three million dollars in losses per year. It stayed afloat essentially only because of the Foundation's periodic subventions. The WARN Act does not in my view require the Hospital to search for ways to stay open when confronted with a complete loss of its principal source of income.

The sole issue in this case is whether the Hospital trustees had advance notice of the Foundation's decision to cease making subventions. After examining the entire record in the light most favorable to the plaintiffs, I conclude the Hospital trustees did not have advance notice.

There are not a lot of cases involving "unforeseen business [p. 8] circumstances." Jones v. Kayser-Roth Hosiery, 748 F. Supp. 1276, from the Eastern District of Tennessee, is one. I don't know if there's another.

There the defendant-employee [sic] was a supplier of nylon hosiery to J. C. Penney, which accounted for 40 percent of the defendant's sales volume. They had quality control problems. J. C. Penney took some of its business away and warned that if there was no improvement in quality, more drastic action would follow. Defendants in that case formed a task force and did a little better. Future

quality control audits by J. C. Penney were mixed – some hose passed and some did not.

However, on May 25, 1989, J. C. Penney suddenly canceled all orders from the defendant. Defendant could not stay open with the reduced order and gave less than 60-day notice to its employees.

The district court held in that case that the loss of J. C. Penney was an unforeseeable business circumstance, allowing a reduction in the notification period under the Act.

I think the facts here really compel the same result.

Plaintiffs deposed seven of the nine Hospital trustees, but elicited no testimony that any of them knew that the Foundation had disbursed principal to the Hospital prior to February 1990. On February 26th, 1990, when the Foundation first received definitive legal and tax advice that future subventions would be improper, they resolved to cease subventions.

[p. 9] Of particular interest to me is the notification of the opinion of counsel that not only exempt status would be lost, but that personal liability might be imposed. Generally speaking, the most stunning piece of news that can ever be set forth in any meeting of any board of trustees is that which involves the words "personal" liability. It usually causes fairly drastic action on the part of all involved.

But February 26th, 1990, is clearly that time when the Foundation first received definitive advice that future subventions would be improper, and on that day they resolved to cease the subventions.

On the same day the Hospital Board voted to close the Hospital and proceeded to notify its employees.

I do not believe that a case can be made for any trier of fact that the loss of funding was not reasonably unforeseeable under the Act. It was sudden, dramatic, and unexpected action outside the Hospital's control.

The Foundation's action was even more sudden, dramatic and unexpected than that which occurred in the J. C. Penney case which I just cited. In the J. C. Penney case at least there was some warning that things may go wrong.

The plaintiffs make, to defeat this argument, broad allegations that the Hospital Board members could have reasonably foreseen the Foundation's decision to discontinue subventions, but they really cite no facts in the record to [p. 10] support any such knowledge by the Hospital trustees, and I think under the Anderson v. Liberty Lobby they have not made an adequate showing.

Plaintiffs' contentions are essentially premised on the argument that the Hospital controlled the Foundation and, thus, could have foreseen and prevented the cutoff in funding. The plaintiffs say the relationship between the Hospital and the Foundation was essentially as one between a parent company controlling a wholly-owned subsidiary.

I think the analogy is unpersuasive because the Hospital Board's sole power was to make annual appointments to the Foundation Board; once Foundation Board members were appointed, they owed an independent

fiduciary duty to the Foundation, and they did not comprise a majority of the nine seat Hospital Board; and both the Foundation and the Hospital were independent not-for-profit organizations, not companies which in any legal sense controlled one another.

The plaintiffs' argument that the Foundation could have continued subventions without jeopardizing its tax exempt status is irrelevant. The Hospital could not change the Foundation's tax status or force it to continue payments. The Foundation, which is not a party to this suit, acted independently of the Hospital in passing its resolution and the Hospital trustees had no advance notice of it.

I guess the last suggestion of the plaintiffs is that [p. 11] because the Hospital Board knew the Foundation's support was critical to its continued operation, it should reasonably have expected the Foundation would "take some action . . . cutting off that support," but this allegation lacks any grounding in fact and demonstrates, I think, to me that there is no triable issue of fact in this lawsuit.

The defendant has shown as a matter of law that the Foundation's resolution to discontinue subventions to the Hospital was a business circumstance not foreseeable on January 14, 1990, 60 days before the Hospital closed.

Furthermore, the Hospital Board immediately gave notice to its employees on February 26th explaining the Hospital had lost its funding and that the Board voted that day to close the Hospital effective March 14, 1990.

Section 2102(b)(3) provides:

> "An employer relying on this [business circumstance defense] subsection shall give as much notice as is practicable and at the time shall give a brief statement of the basis for reducing the notification period."

The Hospital trustees gave notice to the Hospital employees on February 26th, the same day they voted to close the Hospital, essentially the same day they knew that the funding would not be continuing. The notice provided that – and I quote:

> [p. 12] "Until yesterday the Hospital had been receiving substantial economic assistance from Central Community Foundation, a charitable foundation.
>
> "The Foundation has now advised the Hospital Board of Trustees that it cannot provide the Hospital with further financial assistance in the foreseeable future. Without the Foundation's assistance the Hospital will not have sufficient funds to continue its operations."

This notice comported with the timing and content requirements of 2102(b)(3).

I believe the defendant is thus entitled to summary judgment regarding the WARN Act count.

Counts II and III of the complaint, which sound in breach of contract and violation of the Illinois Wage Payment and Collection Act, I'm dismissing for lack of subject matter jurisdiction. These supplemental claims are contingent on the Court's federal question jurisdiction over the WARN Act count. Since all the named plaintiffs

are residents of Illinois, there is no independent basis for diversity jurisdiction.

Thus, I'm granting summary judgment to the defendants on Count I and I'm dismissing Counts II and III for lack of subject matter jurisdiction.

The plaintiffs' motion for summary judgment is denied.

The minute order will read for the reasons stated in open [p. 13] court, judgment is entered for the defendant on Count I. Counts II and III are dismissed, and plaintiffs' motion for summary judgment is denied.

Thank you, counsel.

MR. DIENNER: Thank you, Judge.

Judge, when you were reading your ruling on a couple of occasions you indicated the closing occurred in 1991 and in other cases 1990 –

THE COURT: 1990 is the correct one. If I said 1991, I meant 1990.

MR. DIENNER: Thank you, Judge.

* * *

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

/s/ W. L. Barnes
Official Court Reporter

6-3-92
Date

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT[1]

Sherwin J. Stone, having been duly sworn, states as follows:

1. I have personal knowledge of the following facts and could testify to such facts if called as a witness.

2. I am an attorney licensed to practice law in State of Illinois since 1950. I am associated with the law firm of Altheimer & Gray as a partner.

3. I have represented Central Community Hospital ("CCH") since 1958. At all material times I have been on the Board of Trustees of CCH.

4. I have represented Central Community Foundation ("CCF") since its incorporation on December 20, 1983. At all material times, I have been the President of the Board of Trustees of CCF. CCF's trustees are appointed by the Board of Trustees of CCH but during our terms of office we are independent of and do not report to CCH.

5. On June 7, 1984 as President of CCF, I signed and filed an Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code wherein I described the proposed activity of CCF as being responsible for the prudent investment and management of the

---

[1] Affidavit of Sherwin Stone, submitted as part of the Hospital's Motion For Summary Judgment in the District Court.

funds entrusted to it and the "utilization of its earnings" to give financial support to CCH. The application further stated that all assets received by it from the supported organization (CCH) would be used to establish an endowment fund and that only the income therefrom would be used to give financial support to the Hospital. A copy of that application is attached to CCH's Statement of Uncontested Facts as Exhibit A. I purposely limited CCH's proposed activity to acting as an endowment fund on Laventhal & Horwath's advice. Laventhal recommended that approach to increase CCF's chance of gaining tax exemption.

6. On December 17, 1984 the Internal Revenue Service issued a letter determining that CCF would be exempt from taxation "assuming that (its) operations will be as stated in (its) application for recognition of exemption." A copy of that exemption letter is attached to CCH's Statement of Uncontested Facts as Exhibit B.

7. At the December 20, 1984 meeting of CCH's Board of Trustees, I advised the Trustees that the Internal Revenue Service had granted tax exempt status to CCF and that monies transferred to CCF would be maintained in an endowment fund to produce income for the Foundation's exempt activities. The Board thereafter voted to transfer CCH's investment portfolio to CCF. A copy of the minutes of that meeting are attached to the CCH's Statement of Uncontested Facts as Exhibit C.

8. In December, 1984 and February, 1985, CCF purchased two parcels of real estate for use as professional office buildings by CCH's physicians.

9. CCF made the following unrestricted subventions to CCH:

November 4, 1985	$ 250,000
February 24, 1986	100,000
December 3, 1986	1,000,000
January 27, 1987	1,000,000
June 27, 1987	1,000,000
November 25, 1987	1,000,000
January 15, 1988	600,000
April 15, 1988	1,000,000
August 11, 1988	1,000,000
November 8, 1988	1,000,000
March 2, 1989	1,000,000
June 29, 1989	1,000,000
October 18, 1989	1,000,000
January 22, 1990	1,000,000

10. Subsequent to the last subvention, I became concerned about the frequency of the CCH's need for subventions. I asked CCH's comptroller, Harold Reisler, to prepare a list of all subventions made to date and report all income earned by CCF to date.

11. In February, I received the requested information from Reisler and learned for the first time that CCF's subventions to CCH had exceeded its earnings and that the October 18, 1989 and January 22, 1990 subventions had invaded the principal of CCF's endowment fund. I did a brief review of CCF's application for exemption and the exemption letter (Exhibits A and B) and made the preliminary determination that the invasions of principal may have violated the terms of the exemption grant and could have jeopardized CCF's tax exempt status.

12. I advised CCH's Administrator, P.S. DeMoon, of the invasions of principal and the need to convene a meeting of CCH's Board of Trustees to tell them of the invasions of principal and advise them that the legal and tax ramifications would be investigated immediately.

13. On February 19, 1990, CCH's Board of Trustees met. I told them of the invasions of principal, that the legal and tax consequences would be researched and that I would report back as soon as possible. I also told them that CCF may be precluded from making further subventions until the past invasions had been repaid. The minutes of that meeting are attached to the Statement of Uncontested Facts as Exhibit D.

14. Subsequent to the February 19, 1990 meeting I discussed the tax and legal issues with attorneys at Altheimer & Gray and with Thomas Trabon, an accountant with Laventhal & Horwath. The attorneys prepared a memorandum which is attached to CCH's Statement of Uncontested Facts as Exhibit E. Trabon confirmed the correctness of the attorneys' assessment. They both advised against making any further subventions until a ruling could be secured from the IRS. I was informed that such a ruling might take several months to a year.

15. On February 26, 1990 at 11:00 a.m. I reported what I had learned from the attorneys and Trabon to CCF's Board of Trustees. The Trustees passed a resolution to cease making subventions to CCH until the past invasions of principal had been repaid or CCF had earned sufficient monies to offset the past invasions of principal.

16. On February 26, 1990 at 12:00 noon I reported what I had learned from the attorneys and Trabon and the

action taken by CCF to the Board of Trustees of CCH. Following my discussion with CCH's Board of the action taken by CCF, P.S. DeMoon advised the Board that CCH had sufficient money on hand, plus anticipated revenue, to stay open for two weeks. CCH's trustees thereupon voted to close CCH effective March 14, 1990. Prior to that date, the trustees of CCH had never discussed or considered closing the Hospital. Minutes of that meeting are attached to CCH's Statement of Uncontested Facts as Exhibit F.

17. On February 26, 1990, CCH publicly announced its closure effective March 14, 1990. Stories of the closure were reported on radio and television and in the newspapers. Copies of two such stories are attached to CCH's Statement of Uncontested Facts as Exhibits H and I.

Further affiant sayeth not.

/s/ Sherwin J. Stone

SIGNED AND SWORN TO Before me
this 17th day of June, 1991.

/s/ Irene M. Scharfenberg
Notary Public

Supreme Court, U.S.
FILED
APR 29 1994
OFFICE OF THE CLERK

No. 93-1301

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN, and DR. COSETTE Z. VILLANUEVA,
Petitioners,

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONERS

KARY L. MOSS
MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE
2915 Cadillac Tower
Detroit, Michigan 48226
(313) 962-6540

MARK GRANZOTTO
(Counsel of Record)
One Kennedy Square
Suite 1814
Detroit, Michigan 48226
(313) 964-4720

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE SEVENTH CIRCUIT IMPROPERLY INTERPRETED THE WARN ACT	1
II. PETITIONERS DO NOT ASSERT A NEW LEGAL POSITION FOR THE FIRST TIME IN THIS COURT	3
III. THIS CASE PRESENTS A LEGAL ISSUE OF SIGNIFICANCE TO THE PROPER INTERPRETATION OF THE WARN ACT	4
IV. THERE IS A SPLIT OF AUTHORITY BETWEEN THE CIRCUITS	5

TABLE OF AUTHORITIES

Cases Page

A.T. Kearney, Inc. v. INCA International, Inc., 132 Ill. App. 3d 655, 477 N.E.2d 1326 (1985) 8
Bradley v. Sequoyah Fuels Corp., 1994 U.S. Dist. LEXIS 3864 (E.D. Ok. 1994) 1
Burks v. Lasker, 441 U.S. 471 (1979) 9
Butner v. U.S., 440 U.S. 48 (1979) 8
Chestnut v. Stone Forest Industries, 817 F.Supp. 932 (N.D. Fla. 1993) 2
Electralloy v. United Steelworkers, 162 Bankr. 121 (Bankr. W.D. Pa. 1993) 2
Hunt v. Rosenbaum Grain Corp., 355 Ill. 504, 189 N.E. 907 (1934) 8
In re Pubs, Inc. of Champaign, 618 F.2d 432 (7th Cir. 1980) 8
International Association of Machinists and Aerospace Workers v. General Dynamics, 821 F.Supp. 1306 (E.D. Mo. 1993) 1
Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) 6
Jurcev v. Central Community Hospital, 7 F.3d 618 (7th Cir. 1993) 4
N.L.R.B. v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) 5
Parsley v. Kunja Knitting Mills, Inc., 7 IER Cases 225 (D.S.C. 1991) 2
Ross v. Moffitt, 417 U.S. 600 (1974) 5
Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938) 8
Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 8
Texas v. Mead, 465 U.S. 1041 (1984) 5
United Disposal & Recovery Co. v. Industrial Commission, 291 Ill. 480, 126 N.E. 183 (1920) 8
United States v. Bank of New England, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987) .. 6
United States v. One Parcel of Land, 965 F.2d 311 (7th Cir. 1992) 7
Wholesale and Retail Food Distribution v. Santa Fe Terminal Services, 826 F.Supp. 326 (C.D. Cal. 1993) 2

TABLE OF AUTHORITIES—Continued

Page

Yee v. City of Escondido, —— U.S. ——, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 4

Statutes

29 U.S.C. § 2102(6) (2) (A) 5
20 C.F.R. § 639.9(b) (2) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1301

MYRNA JURCEV, STANLEY MILLER, FLORENCE MOORE, ROSEMARY RIORDAN, and DR. COSETTE Z. VILLANUEVA,

Petitioners,

v.

CENTRAL COMMUNITY HOSPITAL, an Illinois not-for-profit corporation and THE PRAIRIE FOUNDATION, formerly CENTRAL COMMUNITY FOUNDATION, an Illinois not-for-profit corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONERS

I. THE SEVENTH CIRCUIT IMPROPERLY INTERPRETED THE WARN ACT.

Increasingly, litigation under the Worker Adjustment Retraining and Notification Act (WARN) has focussed on the scope of the "unforeseeable business circumstance" defense contained in 29 U.S.C. § 2102(6)(2)(A). *Bradley v. Sequoyah Fuels Corp.*, 1994 U.S. Dist. LEXIS 3864 (E.D. Ok. 1994); *International Association of Ma-*

chinists and Aerospace Workers v. General Dynamics, 821 F. Supp. 1306 (E.D. Mo. 1993); *Chestnut v. Stone Forest Industries*, 817 F. Supp. 932 (N.D. Fla. 1993); *Electralloy v. United Steelworkers*, 162 Bankr. 121 (Bankr. W.D. Pa. 1993); *Wholesale and Retail Food Distribution v. Santa Fe Terminal Services*, 826 F. Supp. 326 (C.D. Cal. 1993); *Parsley v. Kunja Knitting Mills, Inc.*, 7 IER Cases 225 (D.S.C. 1991).

This case is of overriding importance to WARN because the Seventh Circuit has taken a defense premised on "commercially reasonable business judgment", 20 C.F.R. § 639.9(6)(2), and transformed it into what might best be called the ostrich defense. As long as the Hospital remained sublimely ignorant of all relevant facts pertaining to its principal source of funding, it could claim surprise at the ultimate decision to curtail that funding. That surprise, according to the Seventh Circuit, violated the requirements of WARN.

The ostrich defense threatens the entire future of WARN. This is because, for the totally uninformed employer, everything is a surprise, for the employer who chooses to remain oblivious to the events which might affect his business, no eventuality is even foreseeable.

The trustees of the Hospital could not stick their heads into the ground while $12,000,000 was paid by the Foundation over a four year period, beginning in 1985, and claim surprise when these payments touched the Foundation's corpus which began at $19,000,000 in December 1984. Nor could the trustees of the Hospital stick their collective heads in the ground and claim a total lack of knowledge concerning the terms under which the Foundation could continue to make these subventions.

Contrary to the arguments contained in Respondent's brief, the issue involved in this case has nothing to do with the Hospital's *control* over the Foundation's decision making. Resp. 9.[1] Petitioners assume at present that the

[1] **Petitioners Brief is identified as "Pet. 1." Respondent's Brief is identified as "Resp. 1."**

Hospital's trustees could not influence the decision of the Foundation. This fact, however, makes it all the more imperative from a commercial standpoint that the Hospital's trustees have a complete understanding of the terms under which the Foundation could continue its grants to the Hospital.

The question, therefore, is not whether the Hospital could ultimately *control* the Foundation's decision making process; the critical question unaddressed by the Seventh Circuit is whether the Hospital could ever be said to exercise commercially reasonably judgment by being ignorant of the terms and conditions under which the Foundation could continue its funding of the Hospital.

II. PETITIONERS DO NOT ASSERT A NEW LEGAL POSITION FOR THE FIRST TIME IN THIS COURT.

Respondent asserts that "Petitioners' . . . contention to this Court that the Foundation was prohibited from making distributions from principal (Pet. 17) conflicts with the position they took in both courts below." Resp. 9, 15. Respondent's argument that this position is now asserted for the first time is simply wrong. In their brief to the Seventh Circuit Petitioners advanced a number of arguments. Among the arguments made in the Court below were the following:

> In the exercise of 'commercially reasonable business judgment,' 20 C.F.R. § 639.9(b)(2), the Hospital knew or should have known well before the October 1989 subvention, that principal would be utilized to support the Hospital.
>
> * * * *
>
> If in fact the Hospital actually believed that the Foundation was precluded from using principal to support the Hospital, reasonable business judgment in predicting the demands of the Hospital would

> dictate that officers of both the Hospital and Foundation should have been aware of this fact at the time the decision was made to transfer the Hospital's investment portfolio to the Foundation. Ordinary business prudence certainly requires strict monitoring of the prospects for continued availability of essential funds, especially in light of the fact that the Foundation was created for the express purpose of supporting the Hospital.

Petitioner's Brief to the Seventh Circuit at 20-21. Not only did Petitioners present the issue of reasonable foreseeability to the Seventh Circuit, that Court was compelled to address this question in its opinion. *Jurcev v. Central Community Hospital*, 7 F.3d 618, 625-627 (7th Cir. 1993). The Respondent's suggestion that Petitioners are raising an issue for the first time in this Court is, therefore erroneous.[2]

III. THIS CASE PRESENTS A LEGAL ISSUE OF SIGNIFICANCE TO THE PROPER INTERPRETATION OF THE WARN ACT.

Petitioners ask this Court to review a legal question of critical importance—whether the Court below applied the appropriate legal test in analyzing the "unforeseeable business circumstance" defense available under WARN. Contrary to Respondent's assertions, Petitioners are not

---

[2] Regardless, even if Respondent's characterization were accurate, this change in "legal position" does not qualify as a legal issue first presented on appeal to this Court warranting denial of certiorari. For example, in *Yee v. City of Escondido*, —— U.S. ——, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), this Court rejected the respondent's contention that the petitioner was making a separate claim by arguing that a rent control ordinance taking of their property occurred by regulation instead of by a physical taking, as had been argued in the court below. This Court stated: "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." 118 L.Ed.2d at 169. That same reasoning would also apply to this case.

asking this Court to "merely reweigh evidence, analyze factual findings, or otherwise 'correct' allegedly erroneous decisions." Resp. 10.

Obviously, as in any litigation under WARN, the particular facts presented are of overwhelming importance. But Petitioners do not challenge the Seventh Circuit's ruling on the ground that it misapplied the facts. Instead, this case is important because the facts which the Seventh Circuit deemed relevant to the unforeseeable circumstances defense provided in 29 U.S.C. § 2102(6)(2)(A) were based on the subjective view of the Hospital's trustees. *See* Pet. 14. It is the Seventh Circuit's focus on the subjective knowledge of the Respondent's trustees that creates a legal issue of such significance to the operation of WARN.

The cases cited in support of Respondent's argument (Resp. 10) stand only for the proposition that evidence and factual findings will not be reviewed by this Court. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n. 8 (1981). Since Petitioners do not seek review of a factual question or evidence, this argument in Respondent's Brief should carry no persuasive weight.[3]

IV. THERE IS A SPLIT OF AUTHORITY BETWEEN THE CIRCUITS.

This Court's review is also warranted because the Seventh Circuit's failed to apply the principle "that knowledge of officers, directors and other agents is imputed to the corporation if received within the scope of agency and concerns a matter within the scope of the agent's

[3] Respondent's citation to *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), makes no sense. First of all, the case involved the review of a petition for habeas corpus. Second, the case did not involve circumstances in which one party allegedly sought certiorari on a question of law presented for the first time on appeal.

authority." Resp. 10-11. One of the critical questions presented in this case was the time when the Hospital learned that their receipt of funds from the Foundation had actually invaded the principal. Petitioners presented uncontradicted evidence that the Hospital's comptroller was aware of the invasion of principal when it first occurred in October 1989. 7 F.3d at 626. That knowledge, however, was not imputed to the Hospital because, in the Seventh Circuit's view, the comptroller did not understand the significance of this information and did not share it with his superiors.

As noted in Petitioners' original brief, this ruling on the issue of corporate knowledge is directly at odds with the doctrine of cumulative corporate knowledge recognized in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987). Proper application of this doctrine should have led to two conclusions. First, that the Hospital and its Trustees knew that the Foundation's assets had to be monitored closely to avoid invading the principal based upon the fact that at least two of the Hospital's trustees and officers had actual knowledge that the Foundation could not make subventions from the principle. Pet. 17.[4] Second, that the Hospital had knowledge that principal was being invaded as early as October 1979 based upon the testimony of the Hospital's Comptroller. Pet. 19.

The Seventh Circuit's application of traditional agency principles in *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992), is not evidence that the First and Seventh Circuit "fully agree" (Resp. 10) on the law of imputed corporate knowledge.[5]

---

[4] Significantly, Respondent does not mention, even once, that the Foundation and the Hospital shared common directors. Resp. 5-6. *See* Pet. 19-21.

[5] In *Juarez* an employee of a company claimed that she had been sexually harassed by a co-worker and filed an action under Title VII. She argued that her complaint to an accounts payable clerk,

Juarez involved a case in which the knowledge that the plaintiff, a victim of sexual harassment, sought to impute to the corporation was given to an employee in a circumstance that was not within the scope of that employee's agency, nor did it concern a matter within the scope of the agent's authority. Thus, *Juarez* did not address the question of the proper application of agency principles when it is undisputed that the recipient of the information received that knowledge within the scope of his or her agency, and when that information concerned a matter within his or her authority.

Similarly, Respondent's reference to *United States v. One Parcel of Land*, 965 F.2d 311, 316 (7th Cir. 1992), in which the Seventh Circuit cited to *Bank of New England, supra*, is also not evidence of agreement between the circuits. *One Parcel of Land* involved the interpretation of a federal law (the Controlled Substance Act) whose explicit language, according to the Court, "constrains courts to employ a subjective rather than an objective standard in assessing claimant's knowledge." 965 F.2d at 315. Thus, the language of that statute required the court to apply a standard completely different than that required by WARN, which distinguishes it from this case.

Respondent further suggests that the imputed corporate knowledge issue is actually one of state law. It is immaterial whether, in the abstract, the knowledge a corporation possesses implicates a question of state law. What is important is that, in this particular case, the knowledge which a corporation may be said to possess is of critical importance in applying a federal law. And, in light of the fact that WARN will apply almost universally to corporations and the defense at issue in this case and that

---

who had no involvement with the Human Resources Department, which handled sexual harassment complaints, and who had no supervisory authority, should have been imputed to the corporation itself.

application must be based on what that corporation knows or should know, the concept of cumulative corporate knowledge as described in *Bank of New England* takes on extreme importance in the interpretation of this law.

Further, the cases cited by Respondent to support the argument that the doctrine of imputed corporate knowledge is a matter of state law, and thus should not be reviewed, grossly mischaracterizes the issue before this Court (Resp. 11), as well as the well settled principle that the directors of a corporation are chargeable with knewledge of such corporate affairs as it is their duty to keep informed of. *See* Pet. 19-21. *See also Hunt v. Rosenbaum Grain Corp.*, 355 Ill. 504, 189 N.E. 907 (1934); *United Disposal & Recovery Co. v. Industrial Commission*, 291 Ill. 480, 126 N.E. 183 (1920); *A.T. Kearney, Inc. v. INCA International, Inc.*, 132 Ill. App. 3d 655, 477 N.E.2d 1326 (1985); *In re Pubs, Inc. of Champaign*, 618 F.2d 432, 438 (7th Cir. 1980) (citing *Sherwin-Williams Co. v. Watson Industries*, 361 Ill. 598, 198 N.E. 704 (1935).

The doctrine of imputed knowledge should have been applied to determine whether the circumstances causing the hospital closing were reasonably foreseeable. Significantly, Respondent does not cite to any cases in which this Court refuses to review a federal court's failure to properly apply the doctrine of imputed knowledge because it is a matter of state law.[6]

---

[6] Instead, Respondent cites to two cases, Resp. 10, which required the federal courts to interpret unrelated state laws. *See Butner v. U.S.*, 440 U.S. 48, 57-58 (1979) (state law, and not a federal rule of equity, can resolve the question of whether a security interest in property extends to rents and profits); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) (proper construction of insurance contracts). Since this case does not, *Butner* and *Ruhlin* are irrelevant. *See also Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977) (interpretation of SEC Rule 10b-5). Because this case does not present a question of corporate law, but

For these reasons, Petitioners respectfully request that this Court grant their petition for certiorari.

Respectfully submitted,

KARY L. MOSS
MAURICE AND JANE SUGAR
LAW CENTER FOR ECONOMIC
AND SOCIAL JUSTICE
2915 Cadillac Tower
Detroit, Michigan 48226
(313) 962-6540

MARK GRANZOTTO
(Counsel of Record)
One Kennedy Square
Suite 1814
Detroit, Michigan 48226
(313) 964-4720

Attorneys for Petitioners

---

rather involves an interpretation of a federal law—the WARN Act—reliance on *Burks v. Lasker*, 441 U.S. 471, 477-78 (1979) (federal courts should apply state law governing the authority of independent directors to discontinue derivative suits) is misplaced.